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UNITED NATIONS CONFERENCE ON THE LIABILITY OF OPERATORS OF TRANSPORT TERMINALS IN INTERNATIONAL TRADE

FIRST COMMITTEE

SUMMARY RECORD OF THE 1st MEETING

Held at the Austria Center Vienna,
on Wednesday, 3 April 1991, at 10 a.m.

Chairman: Mr. BERAUDO (France)

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The meeting was called to order at 10 a.m.

ADOPTION OF THE AGENDA (item 1 of the provisional agenda) (A/CONF.152/C.1/L.1)

1. The provisional agenda (A/CONF.152/C.1/L.1) was adopted.

CONSIDERATION OF ARTICLES 1 TO 16 AND 20 OF THE DRAFT CONVENTION ON THE LIABILIT OF OPERATORS OF TRANSPORT TERMINALS IN INTERNATIONAL TRADE (agenda item 3) (A/CONF.152/5, 6, 7 and Add.1 and Add.1/Corr.1 and Add.2)

2. The CHAIRMAN drew the Committee's attention to the text contained in docume A/CONF.152/5, which, according to rule 29 of the rules of procedure of the Conference (A/CONF.152/3), was the basic proposal for consideration. The Commit would also be considering alternative proposals or amendments, which would have be submitted in writing. Adoption of such proposals or amendments would be by simple majority, and any States that abstained would be considered as not voting

3. He suggested that the Committee should begin by considering the more substantive provisions of the draft Convention, leaving the less substantive on articles 2, 13, 14 and 20 - till a later stage.

4. It was so agreed.

Article 1 (a) (A/CONF.152/C.1/L.6)

5. Mr. SCHROCK (Germany), introducing his amendment to article 1 (a) (A/CONF.152/C.1/L.6), said that during the preparatory work for the Conference, which had been begun in Rome at the International Institute for the Unification Private Law (UNIDROIT), the scope of the Convention had been broadened considerably. The view expressed in the explanatory report of UNIDROIT had bee that, desirable as it might be to establish a uniform liability for handling intermediaries, it would be unrealistic to seek to do so at that stage. The d text now before the Committee, which had been prepared by the United Nations Commission on International Trade Law (UNCITRAL), did in fact make provision f handling intermediaries. His delegation shared the view expressed in a recent article in the Journal of Maritime Law and Commerce that the definition of "operator" proposed in the draft text was based on the assumption that the ope might provide services in respect of goods in an area in which he had a right access or use, including services which might be performed on board a ship, su loading, unloading, stowage or trimming. While his delegation was in no way opposed to the widening of the scope of the Convention, it believed that the definition in article 1 (a) should make it clear that the handling of goods wa included in the functions of operators of transport terminals: the phrase "to charge" was not sufficient to cover that concept. Some addition was needed i order to provide for situations that differed from the one in which goods were being carried on a means of transport to which no third party had any access. proposal would entail consequential amendments to article 1 (c) and to article but they could be discussed at a later stage.

6. Mr. SWEENEY (United States of America) did not think that the proposed addition would be an improvement, because the phrase "or to handle" was too va In his view, the phrase "to take in charge" was sufficient to cover the many situations that might involve the potential liability of the operator. Refere had been made to the work done by UNIDROIT in 1972, but at that stage efforts been concentrated on the safekeeping aspect of the operator's activities. A

(Mr. Sweeney, United States of America)

subsequent study of terminal operations throughout the world by the UNCITRAL secretariat had shown that in fact safekeeping was no longer the only part of operators' activities, and as a result attention was now being focused on other types of activity. That was why it had been decided, in the analogous provision of the Hamburg Rules, to use the term "in charge" as the best way of defining the individual or enterprise responsible for the goods.

7. Mr. RUSTAND (Sweden) agreed with the representative of Germany that the term "take in charge" was perhaps insufficiently precise; it had given rise to some discussion during the preparatory talks as well as at the previous session of UNCITRAL in 1989. It frequently happened that goods were left on a quay for later collection, without any specific instructions as to their destination: in such a case, were they to be considered as having been "taken in charge" under the terms of the Convention? It was important that the Conference should define the term. However, he did not think the addition of the phrase "or to handle" would be an improvement.

8. Mr. HORNBY (Canada) agreed that the definition contained in article 1 (a) gave rise to some problems, but was not certain that the addition of the phrase "or to handle" would solve them. As he saw it, the definition of "transport-related services" contained in article 1 (d) already made it clear that handling activities were covered by the Convention. It would be best to focus attention on the concept of being "in charge", which had already been used, and defined, in the Hamburg Rules. A further paragraph might be added under article 3 in relation to that concept.

9. Mr. BONELL (Italy) said that he had at first been inclined to favour the German proposal but had now changed his mind in the light of the United States representative's remarks. The fact that the concept of "in charge" was incorporated in the Hamburg Rules was a good reason for maintaining it in the text under consideration. He did not agree, however, with the suggestion of the Canadian and Swedish representatives that the Conference should attempt to define the concept of "taking in charge". Such an exercise would have little chance of success. During the Commission's work on the draft a delegation had proposed the deletion of the words "take in charge goods involved in international carriage in order to", so as to leave it to future users to define the operator more closely. That solution would be preferable to an over-explicit definition.

10. Mr. ROJANAPHRUK (Thailand) agreed with the United States representative that the concept of "taking in charge" covered "handling".

11. Mr. LAVIÑA (Philippines) said that he would have no objection to omitting the words "take in charge goods involved in international carriage in order to" and adding a reference to both "taking in charge" and "handling" in article 1 (d). The text as it stood was, he thought, sufficiently clear, but he would also be prepared to accept the German proposal with a view to facilitating ratification of the draft Convention by as many countries as possible.

12. Mr. SCHROCK (Germany) said that the discussion showed the Conference's interpretation of the concept of "taking in charge" to be somewhat broader than that adopted in other transport conventions. Noting that his delegation's proposal concerning the first sentence of article 1 (a) had received only limited support, he said that he was willing to withdraw it with a view to shortening the debate.

(Mr. Schrock, Germany)

His delegation would, however, wish to have it placed on record that in the understanding of the Conference the concept of "taking in charge" was considerably broader than, for instance, in the General Conditions, 1989, of the Swedish Master Stevedores' Association, which restricted it to placing goods in cargo sheds or premises surrounded by fences.

13. Mr. WALL (United Kingdom) expressed concern at the looseness of the concept of "taking in charge". The discussion had, if anything, left it still looser. In the absence of a clear identification of the person upon whom liability would be placed, the way would be open to overlapping liabilities on the part of several "operators" and to a succession of claims and counter-claims.

14. In his delegation's understanding, article 1 (a), as read together with article 1 (d), did not include the activities of customs and revenue authorities.

15. Mr. SWEENEY (United States of America) agreed both with the German representative's view that the concept of taking in charge was not restricted to storing goods in sheds or behind fences and with the United Kingdom representative's view that article 1 (a) did not cover the activities of customs and revenue authorities. As to the question of precision, he remarked that under existing law the possibility of overlapping liabilities could not be ruled out.

16. Mr. OCHIAI (Japan) gave notice of a proposal by his delegation on the question of stevedores, which would be distributed shortly. He requested the Chairman not to close the debate until the proposal had been discussed.

17. Mr. ZHAO (China) said that his delegation understood the first sentence of article 1 (a) to refer to the entire process which took place between the time when a particular person, who might be a representative of a port authority or an airport authority, took in charge goods involved in international carriage and the time when that person handed those goods over. That broad understanding did not have to be spelt out in the article, as long as it was reflected in the record of the debate.

18. Mr. ROMAN (Belgium) said that his delegation intended to submit a formal proposal in connection with the phrase "in an area under his control", which it considered to be too vague. Unlike the representative of the United States, he did think that the concept of taking in charge should be restricted to the storage of goods in sheds or behind fences; to increase the scope of liability would mean increasing the cost of international transport and would thus be inconsistent with the aim of promoting international trade.

19. Mr. de GOTTRAU (International Road Transport Union), speaking at the invitation of the Chairman and without objection by the Committee, drew attention to the comments submitted by his organization (A/CONF.152/7/Add.1). In the French version of article 1 (a), it would be more appropriate to speak of "... toute personne qui prend sous sa garde ...". Furthermore, it should be noted that the term "person" meant both physical and juridical persons in both public and private law.

20. The CHAIRMAN, summing up the debate on the first sentence of article 1 (a), noted that the amendment proposed by Germany concerning handling operations (A/CONF.152/C.1/L.6) had been withdrawn. Some delegations had expressed concern that the concept of "taking in charge" and the specific operations it involved were not adequately defined. He trusted that careful consideration would be given to the various proposals made and that the matter would be discussed further in

(The Chairman)

connection with other articles in which that concept played a part. With reference to the United Kingdom's objection that the first sentence would leave the situation unclear in practice, he pointed out that the compromise text now before the Conference was the outcome of lengthy and thorough discussions. There was no doubt room for improvement in the wording, a task which might be left to the Drafting Committee. He suggested that the first sentence should remain as it was and wondered whether participants might wish to vote on it.

21. Mr. WALL (United Kingdom) said that his delegation's concern about article 1 (a) was of a substantive nature and could not be dealt with by the Drafting Committee. He thought that a vote on the first part of the article would be premature.

22. Mr. OCHIAI (Japan) pointed out that his delegation's proposal, which concerned the interpretation of article 1 (a), was still pending. He asked whether he might make it orally, before any vote on the article.

23. Mr. BONELL (Italy) agreed with the Chairman's summary of the discussions on the first sentence. The wording was the result of a consensus reached in the Commission after lengthy and very thorough discussions. At so late a stage, he would be most reluctant to see a substantive discussion reopened on the definition of the term "take in charge". The text should be adopted unless there was a clear alternative proposal in writing.

24. The CHAIRMAN, referring to the point raised by the Japanese delegation, said that he preferred to adhere to the procedure of written proposals; the Japanese proposal would accordingly be discussed once it had been circulated in writing.

25. Mr. BERGSTEN (Executive Secretary), explaining voting procedure, said that if the Chairman of one of the Committees saw that there was general agreement on a text discussed by the Committee, there was no reason to put it to the vote. Voting was only necessary if there was obvious disagreement among delegations. By contrast, in the plenary at the end of the Conference, a vote must be taken on each article.

26. With reference to the Japanese proposal, he read out rule 30 of the provisional rules of procedure, which provided that proposals should normally be submitted in writing, but that oral amendments or proposals might be authorized by the President of the Conference. By extension, that included the Chairman of a Committee. Authorization of such a procedure was accordingly left to the discretion of the Chairman.

27. Mr. LAVIÑA (Philippines) endorsed the Executive Secretary's initial comment; the basic principle should be consensus, obviating the need for a vote. Rule 30 should be interpreted broadly, so that all delegations would be able to submit any proposals that might enable the Conference to arrive at a final agreement.

28. Mr. RUSTAND (Sweden) said that, since reference was also made to the concept of "taking in charge" in articles 3 and 5, it would be preferable to defer voting until all the relevant articles had been discussed.

29. Although he agreed with the representative of Italy that the issue had been discussed at length in the Working Group and at the Commission's twenty-second session, that did not preclude discussion of the matter at the Conference. The

(Mr. Rustand, Sweden)

views and proposals put forward would be recorded in the summary records, which would provide a useful frame of reference at a later date.

30. Mr. HORNBY (Canada) said that although written amendments were desirable on complex matters of substance, oral amendments should be acceptable for simpler matters such as the deletion of a word or phrase.

The meeting was suspended at 11.15 a.m. and resumed at 11.55 a.m.

31. Mr. ROMAN (Belgium) expressed surprise at the apparent suggestion that there was no possibility of reopening the debate on a particular issue; if that were the case, there would be no need to work on the draft at all and the Conference could merely put the various articles to the vote.

32. The CHAIRMAN said that the Conference should exercise restraint in considering whether to reopen a discussion.

33. Mr. BONELL (Italy) considered that amendments should in principle be submitted in writing but that, where appropriate, exceptions should be allowed at the Chairman's discretion. He did not recall there having been any suggestion that there should be no possibility of further discussion. There was, however, no time for lengthy debate. The substance of the text now before the Conference, on a highly controversial issue, had been thoroughly discussed before it was drafted and a reopening of the substantive debate at so late a stage would be inappropriate.

34. Mr. WALL (United Kingdom) trusted that it would be possible to proceed without a vote. The discussion on article 1 (a) had been very useful, and subsequent discussions might reveal a need to reopen the debate on certain points and improve the wording of the text. His delegation felt that certain definitions in article 1 (a) needed to be reconsidered before a vote was taken; in general, it hoped that the Committee would not be too eager to take votes too often.

35. The CHAIRMAN said that there would be no vote on the first sentence of article 1 (a) for the time being. He invited the Conference to proceed with its consideration of the second sentence of that article. The proposal announced by Japan concerning conflicts between the Convention and applicable rules of law governing carriage had not yet been circulated as such, but would be found in its comments in document A/CONF.152/7.

36. Mr. OCHIAI (Japan) said it was perfectly clear that the preliminary draft Convention had applied to stevedores even if they were covered by a clause in a bill of lading that extended to them the benefits available to carriers under applicable rules of law governing carriage. The draft Convention under consideration was not quite clear on that point. If it excluded such stevedores, it would not apply to about 90 per cent of the functions it was intended to cover. If it was to be of any use, it would have to include them.

37. Mr. HORNBY (Canada) said that his delegation shared the concern expressed by the representative of Japan about the second sentence of article 1 (a), which seemed to suggest that it would be possible for stevedores to place themselves outside the ambit of the Convention by invoking clauses contained in a carrier's contract. The purpose of the draft Convention was to ensure greater uniformity in the law applicable to limits for stevedores and for terminal operators in general.

(Mr. Hornby, Canada)

If stevedores were allowed to place themselves outside the provisions of the Convention and to have the same limits as carriers, its whole purpose would be defeated.

38. Ms. VAN DER HORST (Netherlands) drew attention to the sentence which her Government had proposed in place of the second sentence of article 1 (a) (A/CONF.152/7/Add.1, p. 6). It was concerned about the meaning of the existing sentence, in particular the word "responsible". The Netherlands had ratified the Hague-Visby Rules, under which a carrier was not responsible for goods before they were loaded on board and after they had been unloaded. The existing sentence suggested that the carrier could be regarded as liable under the Convention at such times, and the word "responsible" had therefore been deleted in the sentence proposed by her Government.

39. Mr. SWEENEY (United States of America) said that his delegation was in favour of keeping the existing wording. During the drafting of the text in the UNCITRAL Working Group, one of the major difficulties had been the reference to the word "stevedore", the meaning of which was not the same in all transport systems. Since the purpose of the draft Convention was to fill existing gaps, the need to have a broad conception of the word "stevedore" had been recognized.

40. Stevedores were not automatically covered by a bill of lading. In fact, that was a key issue in bargaining between stevedores and carriers, the purpose of which was to prevent unnecessary waste of resources and to eliminate dual or even triple insurance coverage. In the United States, stevedores were usually interested only in limiting their monetary liability.

41. Mr. LAVIÑA (Philippines) thought that the second sentence of article 1 (a) was quite vague. He agreed that the term "stevedore" had different meanings in different countries.

42. His delegation wished to make it clear that, when an operator had a dual capacity arising from his responsibility for the goods under the applicable rules, he would not be considered an operator in all circumstances. Secondly, the expression "applicable rules of law governing carriage" referred to both domestic law and treaty law.

43. Mr. BONELL (Italy) agreed that the rules in question should have the widest possible sphere of application, which meant that stevedores should in principle be included. Was he right in thinking that the United States representative's basic concern was that stevedores should not be placed in a worse position than carriers?

44. Mr. SWEENEY (United States of America) said that in the United States a complex situation involving bargaining between stevedores and carriers had led to considerable litigation, which sometimes went in favour of stevedores and sometimes against them. For example, the courts had struck down a number of broad provisions in maritime bills of lading that accorded the protections enjoyed by the carrier to all agents or independent contractors who had anything to do with the transport of goods. It should be noted that stevedores had to bargain for protection. Many carriers were unwilling to extend the terms of their bills of lading automatically to stevedores. When they did so, they charged extra. His delegation had therefore expressed the view that stevedores should be treated in the same way as carriers, in other words that they should not be placed in a worse position than carriers.

45. Mr. BONELL (Italy) thought that until a decision was taken on the limits of liability, it would be necessary to keep the existing text, possibly with the Japanese amendment.

46. Mr. WALL (United Kingdom) said that in his delegation's opinion, carriers must be excluded from the coverage of the draft Convention. That was the primary intent of the second sentence of article 1 (a). If the existing text of the sentence was kept, it would be in the stevedore's interest to seek whatever protection he could obtain from the carrier under the bill of lading or other transport document. His delegation agreed that if it was desired that the stevedore should not be placed in a worse position than the carrier, that could only be decided upon once a decision had been taken on the limitation amounts to be included in the draft Convention. At the present stage, his delegation believed that the draft Convention should specifically include stevedores.

47. Mr. RUSTAND (Sweden) shared the concern expressed by the representative of Canada. It would be unfortunate if the draft Convention created a new gap. His delegation's understanding was that if an operator was liable for goods under another applicable convention, then he would not be liable under the draft Convention. It had never been his delegation's understanding that the stevedore could be exempted from liability under the Convention by clauses contained in a bill of lading. He doubted whether the Netherlands proposal would ensure that stevedores could not escape any limitation and thought that it would have the opposite effect.

The meeting rose at 12.30 p.m.

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UNITED NATIONS CONFERENCE ON THE LIABILITY OF OPERATORS OF TRANSPORT TERMINALS IN INTERNATIONAL TRADE

FIRST COMMITTEE

SUMMARY RECORD OF THE 2nd MEETING

Held at the Austria Center Vienna,
on Wednesday, 3 April 1991, at 2.30 p.m.

Chairman: Mr. BERAUDO (France)

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The meeting was called to order at 2.40 p.m.

CONSIDERATION OF ARTICLES 1 TO 16 AND 20 OF THE DRAFT CONVENTION ON THE LIABILITY OF OPERATORS OF TRANSPORT TERMINALS IN INTERNATIONAL TRADE (agenda item 3) (continued) (A/CONF.152/5, 6, 7 and Add.1 and Add.1/Corr.1 and Add.2)

Article 1 (a) (continued) (A/CONF.152/C.1/L.6, L.19, L.23)

1. Mr. RAMBERG (Observer, International Maritime Committee) called attention to the use of the term "rules of law" in the Commission's draft (A/CONF.152/5). It was his understanding that a contractual clause such as the "Himalaya clause", extending to stevedores the protection given to the carrier, would not amount to a "rule of law" as referred to in the second sentence of subparagraph (a), and thus stevedoring services would not be excluded from the Convention. On the other hand, a State party to the Convention that had ratified the Hague-Visby or the Hamburg Rules or the Multimodal Transport Convention would be subject to provisions of those Conventions appending certain benefits to independent contractors, such as stevedoring services. Where a stevedoring company was covered by such provisions, it would not be clear to what extent the second sentence of subparagraph (a) applied to it.

2. Referring to article 15 of the draft, he pointed out that even if, at the present stage of the discussion, persons who were covered by rules of law governing carriage were excluded from the projected Convention by article 1 (a), they might "re-enter" coverage by the Convention through the application of article 15 if they were found covered by provisions of the Conventions he had mentioned.

3. Mr. SWEENEY (United States of America) remarked that the Hamburg Rules and the Hague-Visby Rules protected the carrier and his "agents or servants". Because of potential coverage under other provisions of law, stevedores did not consider themselves to be either agents or servants, nor did they wish to be so classified. In the drafting of both the Hamburg Rules and the Visby amendments, an attempt had been made to define the independent contractor as including stevedores; in both cases, that attempt had failed, and as a consequence the independent contractor was protected by neither set of rules.

4. It was his impression that in the discussion the Committee had lost sight of the fact that the draft Convention was a non-carriage convention surrounded, as it were, by carriage conventions containing gaps which it proposed to remedy. Stevedores, he insisted, were not carriers, although they might seek some of the benefits accruing from that status.

5. Mr. HERBER (Germany) submitted that the phrase "responsible for the goods under applicable rules of law governing carriage" could pose problems of interpretation as far as the definition of the term "applicable rules" was concerned. In the interests of producing a clear text, and in the belief that there was a general understanding of what was signified by the term "carrier", he suggested the following wording, which was a shortened version of the Japanese proposal (A/CONF.152/C.1/L.19), for the second sentence of article 1 (a): "However, a person shall not be considered an operator whenever he is a carrier." His delegation considered the Japanese delegation's reference to multimodal transport operators to be superfluous, since they were obviously carriers, but he would not object to its inclusion.

6. Ms. JØRGENSEN (Denmark) found the Commission's text quite adequate. She urged that, because the matters under consideration were of great importance, all proposals for amending the Commission's text should be submitted in writing and be fully substantiated. She asked what would be the position under the Convention as drafted of entities which did not describe themselves as stevedores but which performed stevedoring functions.

7. Mr. FILIPOVIĆ (Yugoslavia) remarked that it had long been his country's experience, when attempting to cater specifically for the concerns of stevedores in legislation on maritime and inland navigation, that stevedores tended to seek limited liability and other statutory benefits but declined attendant responsibilities. With regard to the German oral proposal, one effect of its adoption would probably be to reopen the debate concerning the meaning of the term "carrier". He believed that the Convention should define that term. His preference was for the Commission's text.

8. Mr. BONELL (Italy) said that while the German oral proposal seemed at first sight to have the merit of clarity, it might well prove on closer scrutiny to produce uncertainty. Like the previous speaker, he feared that its adoption would raise the question of what was meant by the term "carrier". He believed that the Japanese proposal might be approved in principle, subject to the Committee's later decision with regard to liability limits, following which it might be reviewed.

9. Miss VAN DER HORST (Netherlands), noting the absence of support for the proposal submitted by her delegation for the second sentence of article 1 (a) (A/CONF.152/C.1/L.23), withdrew it in favour of the oral proposal by Germany, which her Government would interpret as implying that a carrier who had goods in his charge before the carriage began or after it had ended would not be considered as a terminal operator for the purposes of the draft Convention.

10. Mr. LARSEN (United States of America) said that his delegation could endorse the German oral proposal as best reflecting the clear distinction between carrier and non-carrier functions.

11. Mr. WALL (United Kingdom) endorsed the German oral proposal. Moreover, it removed the risk of confusion produced by the use of the terms "take in charge goods" and "responsible for the goods" in one and the same article.

12. Mr. LAVIÑA (Philippines) also approved the German oral proposal, while sharing the views expressed by the representatives of Yugoslavia and Italy.

13. The CHAIRMAN invited the Committee to vote on the German oral proposal for the second sentence of article 1 (a).

14. The proposal was adopted by 15 votes to 3.

15. In reply to a question by Mr. FILIPOVIĆ (Yugoslavia), the CHAIRMAN said that in accordance with rule 36 of the rules of procedure, States which abstained from voting were to be considered as not voting. For that reason, he had not called on those abstaining to declare themselves.

16. Mr. LAVIÑA (Philippines) felt that a count should be taken of the number of abstainers, since that seemed to be the intention of the rules of procedure.

17. Mr. BONELL (Italy) suggested that the Drafting Committee might be asked to formulate the second sentence of subparagraph (a) somewhat more elegantly, perhaps by reference to the preliminary draft convention on the subject prepared by the International Institute for the Unification of Private International Law (UNIDROIT).

18. Mr. HERBER (Germany) said he was not opposed to the Drafting Committee making cosmetic changes, but warned against the Committee referring to it questions with substantive connotations. Since the First Committee had adopted his delegation's oral proposal for the second sentence of article 1 (a), it withdrew the proposal for that sentence in paragraph 2 of document A/CONF.152/C.1/L.6.

19. Mr. LEBEDEV (Union of Soviet Socialist Republics) considered the Italian suggestion well founded. His delegation had abstained from voting on the German oral proposal because it found the Commission's text adequate to meet the definition requirement posed by the representative of Yugoslavia.

20. Mr. ZHAO Chengbi (China) agreed with the representative of Italy. His delegation had abstained in the vote on the German oral proposal because the meaning of the term "carrier" was unclear. It had to be defined because its interpretation varied from one legal system to another.

21. Mr. WALL (United Kingdom) suggested that delegations wishing to make improvements to the text of the second sentence of subparagraph (a) should consult informally and present an agreed text to the Committee. He pointed out that the Drafting Committee was not supposed to deal with substantive issues.

22. Mr. RUSTAND (Sweden) said that with the adoption of the German oral proposal a definition of the term "carrier" was urgently needed.

23. The CHAIRMAN said that the definition of the term "carrier" might be discussed later on the basis of written proposals.

24. He said that if there was no objection, he would take it that the Committee approved the text of article 1 (a) reproduced in document A/CONF.152/5, as amended orally by Germany, for referral to the Drafting Committee.

25. It was so decided.

Article 1 (b) (A/CONF.152/C.1/L.4)

26. Mr. LARSEN (United States of America) introduced his delegation's proposal for subparagraph (b) (A/CONF/152/C.1/L.4). He said that the draft Convention dealt with the transport of goods, not with the means of transporting them. Goods packed in containers should be covered by the Convention, but empty containers in storage yards, or in trucks and railroad cars, should not. It was necessary to make that clear.

27. Mr. HERBER (Germany) thought it was best not to make exceptions. Containers which were handled or carried as cargo should be treated under the terms of the Convention; compensation should therefore be payable for empty containers which were damaged in transit. The proposal would make an unwarranted exception for certain kinds of terminal operators.

28. Mr. LAVIÑA (Philippines) agreed. It was already clear that the goods covered by the Commission's draft included goods packed in containers, but not empty containers.

29. Mr. WALL (United Kingdom) preferred subparagraph (b) as it stood. There would be some inconsistency in adding a reference to storage yards for empty containers in subparagraph (b) when geographical distinctions of that kind had been rejected for subparagraph (a).

30. Mr. ROMAN (Belgium) observed that operators accepted packed containers without inspecting their contents. If goods were damaged while in transit, it would be difficult for the operator to prove that he was not liable.

31. Mr. OCHIAI (Japan) said that the United States proposal would raise difficulties with regard to the application of article 10 (3). It would be uncertain whether an operator who met the cost of repairs to empty containers could exercise the right of retention provided by that article.

32. The CHAIRMAN said that the Committee's understanding was that the term "goods" did not exclude empty containers, such as containers returning to their starting point after unloading.

33. Mr. BONELL (Italy) and Ms. JORGENSEN (Denmark) opposed the United States proposal.

34. Mr. LARSEN (United States of America) noted the difference of views in the Committee as to whether empty containers in storage yards were goods for the purposes of the draft Convention. His own delegation's view was that they were not.

35. The CHAIRMAN said that if there were no objection, he would take it that the Committee approved the text of article 1 (b) as it stood, for referral to the Drafting Committee.

36. It was so decided.

Article 1 (c) (A/CONF.152/C.1/L.6, L.23)

37. The CHAIRMAN said that the Committee need not consider the proposal by Germany to amend subparagraph (c) (A/CONF.152/C.1/L.6, para. 3) since it was simply consequential upon its proposal for the first sentence of subparagraph (a), which had been withdrawn.

38. Miss VAN DER HORST (Netherlands), referring to her delegation's proposal for article 1 (c) in document A/CONF.152/C.1/L.23, said that its purpose was to make it clear that the international carriage of the goods took place according to one contract only. Consignments carried between two domestic points and awaiting carriage abroad under a second contract would be excluded.

39. The CHAIRMAN recalled that the word "identified" had been included in the Commission's draft for that very reason, namely that the operator must be able to verify, by glancing at the goods, whether they were intended for international carriage. He should not be required to consult the contract of carriage.

40. Mr. FILIPOVIĆ (Yugoslavia) endorsed the principle underlying the Netherlands proposal. It was at the initial stage, the stage when the contract or documents were drawn up, that the intention of international carriage was created. In some cases the goods might not actually be carried to their destination - for instance, they might be stolen in transit.

41. Mr. WALL (United Kingdom) objected to the Netherlands proposal. A reference to the contract of carriage would make it impossible for the operator to ascertain whether he was liable for the goods.

42. Mr. SCHROCK (Germany) agreed that it would be problematic to include in the draft a reference to the contract as such, since the scope of the contract was not verifiable by the operator by means of any documents or markings on the goods. In paragraph 2 of its written comments on the draft (A/CONF.152/7) his Government had argued that purely domestic legs of segmented international transport, if identified as being subject to individual domestic contracts, should not be governed by the Convention. His delegation could accept subparagraph (c) as it stood.

43. Mr. HORNBY (Canada) objected to the exclusion of domestic segments from the scope of the Convention. There should be one rule to cover all transport, to be determined by the ultimate destination and to cover both combined transport operations and segmented contracts. He opposed the proposal of the Netherlands delegation, whose interpretation of subparagraph (c) differed from that of the German delegation.

44. Mr. LARSEN (United States of America) also opposed the Netherlands proposal. Including a reference to the contract would raise undue complications.

45. Mr. LAVIÑA (Philippines) agreed. However, the present wording of subparagraph (c) was awkward and called for stylistic improvement.

46. Miss VAN DER HORST (Netherlands) withdrew her delegation's proposal.

47. Mr. ZHAO Chengbi (China) said that the consideration of article 1 (c) led his delegation to question whether the title of the draft Convention was appropriate. Its views on that subject were set out in its written comments (A/CONF.152/7/Add.2). The title of the Convention should be amended to read "Convention on the Liability of Operators of Transport Terminals in International Carriage of Goods". Transport in the international carriage of goods could be interpreted more widely than transport in international trade and would thus facilitate the application of the Convention to the transport of non-trade goods, such as goods for purposes of aid, exhibition and so forth, which accounted for a large part of international carriage of goods. During the discussion of article 1 of the draft Convention at the twenty-second session of the United Nations Commission on International Trade Law, most countries had taken the view that the term "goods", as used in the Convention, included non-trade goods. The task of regulating the international transport of goods was covered by many conventions, but there was no convention covering transport terminals and it was appropriate for that gap to be filled. The title proposed by China would be appropriate for the purpose.

48. The CHAIRMAN said that, although the content of article 1 (c) was related to the title of the Convention, it would be necessary to consider the sum of all its articles in order to be sure that the international carriage element prevailed over that of international trade. He felt it would be wiser to take up that question after all the substantive articles of the draft had been examined. He therefore suggested that consideration of the Chinese proposal for the title of the Convention should be deferred.

49. Mr. ZHAO Chengbi (China) agreed.

50. Mr. SCHROCK (Germany) said that his delegation's proposal for an additional sentence in article 1 (A/CONF.152/C.1/L.6, para. 4) was relevant to the discussion of article 1 (c). The proposal had emerged from discussions held with the operators of transport terminals concerned not with maritime carriage but with carriage by rail or road. According to draft article 1 (c), carriage was to be considered as international if the places of departure and destination of the goods were identified as being located in two different States. The transport documents which accompanied goods in such a situation would constitute a decisive aid towards such identification. His delegation therefore believed that it would be helpful if the Convention stipulated that the use of international transport documents such as CMR or CIM documents constituted a presumption of international carriage and that the use of national transport documents implied the opposite. His delegation now recognized that the proposal set forth a legal rule which did not perhaps fit systematically into article 1. It was ready, therefore, to leave a decision on its place in the Convention either to the First Committee or to the Drafting Committee. It nevertheless wished to submit the substance of its proposal to the Committee for consideration.

51. Mr. FILIPOVIĆ (Yugoslavia) supported the German proposals.

52. Mr. MUTZ (Observer, International Organization for Railway Transport) agreed with the idea in the first part of the proposal, namely that the existence of an international transport document should give rise to a presumption of international carriage, on the ground that it would facilitate the implementation of the Convention. He had difficulty in endorsing the second part, which might enable the operator of a transport terminal to escape liability under the Convention.

53. Mr. HORNBY (Canada) said that the presumption of international carriage must be rebuttable. To say that goods accompanied by a domestic transport document should be deemed not to be involved in international carriage would offer operators of transport terminals an opportunity to escape liability. The choice of document should be only one factor in determining whether carriage was or was not international. If it was made clear that the presumption was rebuttable, he could support the German proposal.

54. Mr. WALL (United Kingdom) said that he had considerable sympathy for the German proposal. Anything which would help the terminal operator to identify his liability under the Convention constituted a benefit. The method suggested, however, was only one of a number of ways in which that could be done. The proposed addition might not be appropriate in article 1 and a better location could perhaps be found for it. While it should not constitute an exclusive rule it could be regarded as a helpful step forward.

55. Mr. SWEENEY (United States of America) said that he was satisfied with article 1 (c) as it stood. One immediate difficulty which his delegation had with the German proposal was that transport documents were frequently not identified as domestic or international. A bill of lading, for example, was simply a bill of lading. Road and rail services in and between the United States, Mexico and Canada did not use the documents prescribed in the international conventions, and the transport documents which were employed did not identify themselves as being national or international. Moreover, the requirement that an international transport document should be "known to the operator" placed an impossible burden of proof on shippers. He agreed with the Canadian representative that the presumption must be rebuttable, but the difficulty could be removed entirely by deleting the clause "which is known to the operator" from both parts of the German proposal.

(Mr. Sweeney, United States of America)

The highly subjective nature of that element of proof would thus be eliminated. In his view, however, the proposal as a whole was made unnecessary by the objective test constituted by article 1 (c) as it stood.

56. Mr. LEBEDEV (Union of Soviet Socialist Republics) said that the idea behind the German proposal, of making the distinction between international and domestic carriage more readily apparent, was attractive, but spelling it out in the Convention posed serious problems. The distinction between international and domestic documents was uncertain. Documents established by international organizations and labelled as such were also used domestically, particularly in the framework of multimodal transport. To consider such carriage as international merely because the document used bore a stamp reflecting its international origin could be quite risky, particularly for large countries. Moreover, the very concept of a "document" was so broad and complex that its introduction into the article could lead to additional difficulties. The question whether carriage was or was not international should be governed by the criterion set out in article 1 (c), without the introduction of any additional test, nor should such a test be included as an independent article or paragraph in some other part of the Convention. To do that would merely make its implementation more complicated.

57. Mr. LAVIÑA (Philippines) said that he too felt that the German proposal would complicate the issue. What made carriage international was the fact that it took place between two different States. Using as a test documents which were not readily identifiable would only lead to more complications. Article 1 (c) set forth a valid and logical rule and should remain as it was.

58. Mr. WALL (United Kingdom) said that his delegation was generally content with the definition in article 1 (c) as it stood. However, it was important that a terminal operator should be given a clear indication that he was taking in charge goods that carried with them a liability to which the Convention applied. While he could accept some of the arguments concerning the subjective language of the proposed addition, he felt that the use of the words "are identified" in the original wording already introduced a subjective element. The Convention should include some indication of how that identification was to be carried out. Some form of document or notice should have to be delivered to the terminal operator to give him clear notice that he could be liable under the Convention for the goods in question. The point was important and his delegation was therefore ready to support the German proposal, though perhaps not as a part of article 1 or precisely in its present form. A terminal operator must be made well aware that he was accepting goods to which a liability would attach.

59. Mr. RUSTAND (Sweden) said that although some clarification of the provision in article 1 (c) might be necessary, he did not think it should be on the lines suggested in the German proposal. When the subparagraph referred to the identification of the place of destination of the goods it was not clear who was to make that identification. Presumably it would be done by the operator, or by his staff on his behalf, but that was not apparent from the text. He agreed with the point made by the representative of the United Kingdom that the transport document should be only one means of establishing that goods were to be taken abroad. Labelling and marking were other means. Regarding the question of notice to the operator raised by the the United Kingdom representative, he observed that the normal procedure was not for the documentation to be presented to the operator when the goods were delivered to the terminal but afterwards, when the owner of the goods collected them. One way of clarifying the meaning of the words "are

(Mr. Rustand, Sweden)

identified" would be to add after those words the words "or reasonably ought to have been identified". It would then be possible to apply the "reasonable man" test: for example, if the goods were clearly marked, a court would not accept a claim by the terminal operator that he had not identified them as being for international carriage and should therefore escape liability. If his oral proposal was not acceptable to the Committee, he was ready to accept the text as it stood.

60. Mr. SCHROCK (Germany) said that his delegation's intention was that the presumption of international carriage should be rebuttable. It withdrew the second half of its proposal. The first part of the proposal was not intended to detract from the substance of subparagraph (c), but merely to add something to cover the case of there being transport documents known to the operator which clearly indicated the international nature of the carriage, particularly where there might be false markings on boxes or containers.

61. Mr. ASTAPENKO (Byelorussian Soviet Socialist Republic) said that his delegation found subparagraph (c) entirely balanced. It endorsed the views of the United States and the Soviet Union that the text should remain as it stood. It shared the doubts expressed about the German proposal by other delegations, and particularly the views advanced by Sweden. It based its position on the Russian version of article 1 (c), which made it quite clear that the operator was the person who actually ascertained whether the carriage was international or not.

62. Mr. ZHAO Chengbi (China) said that his delegation could not support the German proposal because of the difficulty of distinguishing domestic carriage from international carriage, particularly by means of documentation. Also, the aim of the draft Convention was to lay down uniform rules. The Commitee should take care not to exclude too many cases lest the scope of the Convention became too limited. The Chinese delegation therefore approved subparagraph (c) as it stood.

63. Mr. SAFARIAN NEMATABAD (Islamic Republic of Iran) said that his delegation also approved subparagraph (c) as it stood.

64. Mr. WALL (United Kingdom) referred to the point raised by the delegation of the Byelorussian Soviet Socialist Republic about who, according to the text of article 1 (c), ascertained whether the carriage was international. Having compared the English, French, Russian and Spanish versions, his delegation found that the former two gave a somewhat different interpretation from the latter.

65. The CHAIRMAN said that discrepancies of that nature could be left to the Drafting Committee to resolve.

66. He now intended to invite the Committee to vote on the first part of the German proposal in paragraph 4 of document A/CONF.152/C.1/L.6. When a vote had been taken earlier in the meeting, the Philippines delegation had suggested after the vote that abstentions should be counted. He wondered whether there was any support for that proposal, bearing in mind that the counting of abstentions was not provided for in the rules of procedure and that abstentions did not affect the result of the vote.

67. Mr. LAVIÑA (Philippines) observed that the practice throughout the United Nations system was that abstentions were counted. It was of course understood that they did not affect the result of the vote, but they did indicate the preferences of a proportion of participants.

68. The CHAIRMAN said that it had been pointed out by the Secretariat that abstentions had been counted on several occasions during the United Nations Conference on Contracts for the International Sale of Goods in 1980. They could consequently be counted at the present Conference.

69. Mr. HORNBY (Canada), speaking on a point of order, said that some delegations were clearly opposed to the first part of the German proposal and others had indicated that they could support it if it was amended. The German delegation had acknowledged that the intention of the first part of its proposal was that the presumption of international carriage was to be a rebuttable one, but some redrafting would be needed to make that clear. Consequently, if asked to vote on the first part of the German proposal as it stood, his delegation would have to oppose it, but it might be able to accept an amended formula. Given the difficulty of redrafting the proposal in the Committee, the Canadian delegation would be prepared to accept forthwith the principle contained in the first part of the German proposal on the understanding that it would be left to the Drafting Committee to ensure that it was worded in such a way as to reflect the notion of a rebuttable presumption.

70. The CHAIRMAN invited the German delegation to clarify the first part of its proposal along the lines advocated by the Canadian representative.

71. Mr. SCHROCK (Germany) said that, on the understanding that the Drafting Committee would improve the wording of the proposal and that the Committee would vote only on its substance, his delegation amended the first part of its proposal to read:

> "If the goods are accompanied by an international transport document which is known to the operator, it shall prima facie be presumed that such goods are involved in international carriage."

72. Mr. LAVIÑA (Philippines) said that his delegation considered that the revised proposal did not help to define international carriage. It preferred the text of subparagraph (c) as it stood. Furthermore, it could not agree to the idea that a text which had not been approved by the Committee should be passed to the Drafting Committee for consideration. That would violate rule 47 of the rules of procedure.

73. Mr. TARKO (Austria) said that his delegation did not understand what was meant by a prima facie presumption. It was satisfied with subparagraph (c) as it stood, particularly because of its objectivity and flexibility. If the Committee approved the revised German proposal, his delegation would ask for clarification of the notion of a prima facie presumption.

74. The CHAIRMAN observed that the term "prima facie" was the sort of formulation that could be reviewed by the Drafting Committee.

75. Mr. WALL (United Kingdom) said that his delegation opposed the revised proposal. It could, however, support one element of it and wished to inform the Committee that it was considering making a proposal for a different part of the draft Convention which would read:

> "If a document is presented to the terminal operator indicating that the goods are involved in international carriage, that should be regarded as prima facie evidence that the provisions of this Convention apply to such goods."

76. Mr. OCHIAI (Japan) said that his delegation could not support the revised wording suggested by Germany unless a clear definition of the term "international transport" was included in the Convention. In his view the expressions "international transport" and "international carriage" were tautological.

77. The CHAIRMAN invited the Committee to vote on the first part of the German proposal in paragraph 4 of document A/CONF.152/C.1/L.6 as orally amended by its sponsor, on the understanding that it would be left to the Drafting Committee to improve the wording where necessary.

78. The proposal was rejected by 25 votes to 5, with 1 abstention.

79. The CHAIRMAN said that if there was no objection, he would take it that the Committee approved the text of article 1 (c) as it stood, for referral to the Drafting Committee.

80. It was so decided.

The meeting rose at 5.30 p.m.

UNITED NATIONS

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UNITED NATIONS CONFERENCE ON THE LIABILITY OF OPERATORS OF TRANSPORT TERMINALS IN INTERNATIONAL TRADE

FIRST COMMITTEE

SUMMARY RECORD OF THE 3rd MEETING

Held at the Austria Center Vienna,
on Thursday, 4 April 1991, at 9.30 a.m.

Chairman: Mr. BERAUDO (France)

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The meeting was called to order at 9.45 a.m.

CONSIDERATION OF ARTICLES 1 TO 16 AND 20 OF THE DRAFT CONVENTION ON THE LIABILITY OF OPERATORS OF TRANSPORT TERMINALS IN INTERNATIONAL TRADE (agenda item 3) (continued) (A/CONF.152/5, 6, 7 and Add.1 and Add.1/Corr.1 and Add.2)

Article 1 (d) (A/CONF.152/C.1/L.23)

1. Miss VAN DER HORST (Netherlands), introducing her delegations's proposal (A/CONF.152/C.1/L.23), said that in her country many terminal operators performed other services in addition to the physical handling of goods: for example, they often financed certain services in relation to the transport of goods. During the meeting of the UNCITRAL Working Group, however, it had been agreed that the term "transport-related services" concerned only the physical handling of the goods. Her Government believed that the point should be made clear in the article itself.

2. Mr. LAVIÑA (Philippines) supported the Netherlands proposal.

3. Mr. WALL (United Kingdom) said that his delegation had considerable sympathy with the Netherlands proposal, but thought that, since the proposal set forth an exhaustive list of transport-related services, it would be necessary to examine the proposed list to determine whether it was complete. In addition, it was his understanding that certain activities, such as quarantine measures, which involved handling of the goods but which were in fact a public function undertaken by the authorities, were not to be covered by the Convention.

4. Mr. LARSEN (United States of America) agreed that the definition of transport-related services should not include financial services. However, his delegation did not wish to limit the activities of terminal operators which certainly involved more than physical handling. It was therefore in favour of keeping the existing definition, which would cover not only current services but also those which might be provided by terminal operators in the future.

5. Mr. ROMAN (Belgium) supported the Netherlands proposal. It was essential that the draft Convention should be limited to the physical handling of goods.

6. Mr. LEBEDEV (Union of Soviet Socialist Republics) noted that the draft Convention used the word "includes", which indicated that the list of services mentioned was not exhaustive and was given only for the purpose of illustration. The Netherlands proposal used the word "means", which could give the impression that the paragraph contained an exhaustive list of the operations involved in the physical handling of goods. In his delegation's opinion, a broader definition, such as would result from the word "includes", would be preferable.

7. Mr. LAVIÑA (Philippines) supported the existing wording of the paragraph. It was necessary to have as broad a definition as possible, and the word "includes" should therefore be kept.

8. The CHAIRMAN invited the Committee to vote on the Netherlands proposal on article 1 (d) (A/CONF.152/C.1/L.23).

9. The Netherlands proposal was rejected by 11 votes to 3, with 3 abstentions.

Article 1 (e) and (f)

10. Mr. RUSTAND (Sweden) said that the definitions in the two subparagraphs seemed to exclude any possibility of oral notices or requests. His Government considered it preferable to leave it to the parties involved to determine the form in which a

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notice should be given or a request made, in accordance with good commercial practice and their own interests. If the draft Convention required the use of a specific form, that would cause confusion in a number of legal systems where it was up to the courts to decide on the value of evidence presented in writing or orally. He was not making a proposal to delete the subparagraphs in question but thought that the record should state that some delegations had difficulties with the definitions.

11. Mr. TARKO (Austria) supported the view expressed by the Swedish representative. There was also the question of what was meant by "a record of information". During a lengthy discussion of the matter at a meeting of UNCITRAL in 1989, various delegations had expressed different views on the meaning of that term. In his opinion, it would therefore be preferable to delete the two subparagraphs in question.

12. Mr. WALL (United Kingdom) said that his delegation was satisfied with the existing wording of subparagraphs (e) and (f) but took note of the concern expressed by the delegations of Austria and Sweden.

13. Mr. HERBER (Germany) shared the concern expressed by the representatives of Austria and Sweden. He thought that it would be possible to give a notice or to make a request orally and that there was consequently no need for a definition of the terms "notice" and "request" in the draft Convention. His delegation therefore proposed that the two subparagraphs should be deleted.

14. Mr. LAVIÑA (Philippines), noting that the matter had been thoroughly discussed at the most recent session of the UNCITRAL Working Group, said that the majority of delegations had supported the two definitions in question, as he did himself. He appreciated the fact that in some domestic legal systems it was possible to give a notice or make a request orally, but thought that the terms should be defined in the draft Convention in order to have a uniform rule.

15. Mr. BONELL (Italy) thought that subparagraphs (e) and (f) permitted oral notices or requests and simply sought to ensure that there was some sort of record of notices given or requests made orally in order to avoid unnecessary litigation. Given the current state of technology, in particular computerized communication systems, he did not think that the provisions in question would constitute a heavy burden on the parties concerned. In that connection, he referred to other related international instruments, which seemed to adopt the same approach. His delegation was in favour of keeping the existing text of the two subparagraphs.

16. Mr. FILIPOVIĆ (Yugoslavia) thought that the two definitions were not necessary and should be deleted.

17. Mr. MORAN (Spain) was in favour of keeping subparagraphs (e) and (f). Referring to article 11, he said that it was essential for the draft Convention to have a system for notices concerning loss or damage. The need to prove that a notice had been given must also be borne in mind. Consequently, the two subparagraphs were necessary and should be kept.

18. Mr. RUSTAND (Sweden) said that in Sweden, as in many other countries, the law required that the written form should be employed only where important transactions such as the transfer of real estate or the drafting of a will were involved. In

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cases of disputes over other transactions, it was thought best to leave it to the parties concerned to prove their case in court on the basis of either written or oral evidence.

19. In claims under the draft Convention, it would normally be for the operator, carrier or cargo-owner to produce some form of documentation to prove that he had made the notice or request concerned. However, such documentation might well be mislaid or lost, and it would be unsatisfactory if the party involved could not then call upon the testimony of witnesses to prove that the notice or request had in fact been made. To require that such notices or requests be made in a specific form would in his view be unduly restrictive and would tie the hands of judges when cases were brought before a court.

20. The CHAIRMAN invited the Committee to vote on the German oral proposal to delete subparagraphs (e) and (f) of article 1.

21. The German oral proposal was rejected by 18 votes to 6, with 3 abstentions.

Article 1, proposal for new subparagraphs

22. Mr. LARSEN (United States of America), introducing his delegation's proposal (A/CONF.152/C.1/L.5), said there were a number of clauses in the Convention which made reference to "declarations in writing" by the operator. In view of the fact that "writing" in today's world was often electronic, his delegation believed that a specific indication to that effect should be included.

23. Mr. ABASCAL (Mexico) pointed out that his delegation had already submitted a proposal to the Secretariat in connection with the suggestion made in paragraph 3 of the comments by the International Maritime Committee (A/CONF.1/152/7/Add.2) that article 4 (4) should use the terminology which already appeared in the revised Incoterms 1990, to the effect that a document could be replaced by an "equivalent electronic data interchange message". Although in principle he supported the United States proposal, it might be preferable, for the sake of uniformity, to adopt the wording used in Incoterms 1990.

24. Mr. ZHAO Chengbi (China) supported the United States proposal. Since the Convention was likely to remain in force for many years to come, provision should be made not only for more traditional forms of writing, but also for more advanced forms. The revised Incoterms 1990, with which all delegations would be familiar, stressed the importance of electronic messages as a tool to promote the development of international trade.

25. Mr. OCHIAI (Japan) supported the United States proposal.

26. Mr. RUSTAND (Sweden) said that under the Swedish legal system, it would in any event be up to the courts to decide whether "writing" was to be interpreted as including electronic writing, and in practice they would no doubt do so. Thus for Sweden the United States proposal would be superfluous.

27. Mr. HORNBY (Canada) said that electronic writing was already an acceptable form of writing in most States, so that the addition was not strictly necessary. Generally, it was inadvisable to add to a text definitions of terms that were already well understood, since to do so might lead to problems of interpretation. For example, the addition might be taken to imply that where electronic writing was not specifically referred to in other instruments, it was therefore excluded. The Convention should be kept as flexible as possible.

28. Mr. LEBEDEV (Union of Soviet Socialist Republics) supported that view. Technology was constantly evolving, and in the not too distant future new forms of writing might well be introduced. Unless article 1 was to include a general definition covering all possible forms that writing might take, it would be best not to single out one particular form for emphasis.

29. Mr. LAVIÑA (Philippines) pointed out that the United States text contained the word "includes", implying that other forms besides electronic writing were covered: its intent was merely to ensure that electronic writing was not excluded. Article 1 (8) of the Hamburg Rules already contained a definition of "writing" as including, inter alia, telegram and telex. He saw no harm in adding the United States text, since it would dispel any possible doubts on the issue and would be of help to some States.

30. Mr. WALL (United Kingdom) agreed with the representatives of Canada, Sweden, and the USSR that the proposed definition was neither necessary nor helpful.

31. Mr. ABASCAL (Mexico) noted that the definition was not exclusive; in addition, it would have the merit of covering any new forms of writing that might be developed in the future. Whatever the outcome of the present discussion, he would like his own delegation's proposal in relation to article 4 (3) to be taken up at a later stage.

32. Mr. ROJANAPHRUK (Thailand) said that even for States where it was left to domestic courts to interpret the term, it would be an advantage to include such a definition, since then the courts would have no alternative but to accept it. Although electronic writing was already regarded as acceptable, there was still no harm in including the definition, which in any case was not exhaustive. He supported the United States proposal.

33. Mr. BONELL (Italy) said that while he appreciated that any definition was bound to have certain disadvantages, he too had some sympathy for the United States proposal. It was clear from the wording of the text that it was not in fact intended as a definition, but simply a reminder that electronic writing, the most important and frequently used means of communication in the context of the Convention, was covered by the term "writing". The Committee should also bear in mind that a definition of "writing" was included in a whole series of earlier conventions, such as the Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention for the Execution of Foreign Arbitral Awards of 1927, the New York Convention, 1958, and the Geneva Convention, 1961, not to mention the 1978 Convention (the Hamburg Rules). For the Convention now under discussion to omit such a definition, therefore, might lead to difficulties of interpretation.

34. However, should the majority of the Committee be opposed to including such a text, he would strongly support the Mexican proposal that a reference be made to the Incoterms formulation in the context of article 4.

35. The CHAIRMAN noted that a number of earlier instruments specifically defined the means of communication (telegram, telex) covered by the term "writing". More recent Conventions, notably the two UNIDROIT Conventions (Ottawa 1988), included the same form of words as was used in subparagraphs (e) and (f).

36. Mr. BERGSTEN (Executive Secretary) said that "writing" was explicitly mentioned in the draft Convention in only two places, once in the substantive portion (article 12 (4)) and once in the final clauses (article 25 (1)). A definition in article 1 would, of course, apply to the final clauses as well as to

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the substantive part. In addition, three other articles, namely 1 (e), 1 (f) and 4 (3), had wording which was similar to that used in other instruments and which was intended to cover computer-to-computer messages.

37. Mr. ROMAN (Belgium) said that his delegation would not, in principle, be opposed to the United States proposal if sufficient guarantees of authenticity were provided.

38. Mr. RAMBERG (Observer, International Maritime Committee) remarked that adoption of the United States proposal would in no sense invalidate the suggestion made by the Mexican representative with regard to article 4 (3). The expansion of electronic data interchange and frequent replacement of written documents by electronic messages made it necessary to indicate with absolute clarity that the term "document" included such new methods of communication. Referring to the 1990 revision of Incoterms, he suggested that the proposed addition to article 4 (3) might read as follows "... and may be replaced by an equivalent electronic data interchange message".

39. Mr. BONELL (Italy) said that if the words "declaration in writing" in article 12 (4) were replaced by the word "notice", a definition of which had already been approved in article 1 (e), and if article 4 (3) were amended along the lines suggested by the previous speaker, there would be no need for a definition of "writing".

40. Mr. LAVIÑA (Philippines), noting that almost all existing conventions included a definition of "writing", expressed the view that, for the sake of uniformity, a definition should be included in article 1.

41. Mr. LARSEN (United States of America), again emphasizing the importance of the question of principle raised in his delegation's proposal, said that he was prepared to go along with the idea just put forward by the Italian representative and to leave the matter in abeyance pending consideration of article 12.

Article 1 (a) (continued) (A/CONF.152/C.1/L.29)

42. The CHAIRMAN, drawing attention to a proposal by the Belgian delegation concerning article 1 (a) (A/CONF.152/C.1/L.29), said that, since the proposal had been circulated after the Committee's adoption of article 1 (a), a decision to consider it would fall under rule 33 of the rules of procedure, which required a two-thirds majority of the representatives present and voting.

43. Mr. WALL (United Kingdom) said that undue haste in adopting decisions, as well as any tendency to apply procedural rules too strictly, was to be deprecated. The practice of taking indicative votes was a useful means of sounding a committee's general feeling. Rather than take a formal vote requiring a two-thirds majority, the Chairman might perhaps ascertain whether any delegation objected to considering the Belgian proposal. His delegation, for one, had no such objection.

44. The CHAIRMAN said that the Committee had adopted its rules of procedure and had to comply with them. It went without saying that procedural rules would be applied in a flexible manner.

45. Mr. ROMAN (Belgium) said that his delegation endorsed the views just expressed by the representative of the United Kingdom. It was surprising to note that the Committee was required to vote on some proposals while others were forwarded

(Mr. Roman, Belgium)

directly to the Drafting Committee. He stressed the importance of his delegation's proposal and pointed out that the Committee had not yet completed its consideration of article 1.

46. Mr. BONELL (Italy) expressed unconditional support for the Chairman's ruling.

47. The CHAIRMAN invited the Committee to vote on the proposal to reopen the discussion on article 1 (a).

48. There were 16 votes in favour, 12 against and 6 abstentions. Having failed to obtain the required two-thirds majority, the proposal was not adopted.

49. Mr. LAVIÑA (Philippines), speaking in explanation of vote, said that his delegation had abstained because, while recognizing that it was the Chairman's duty to apply the rules of procedure, it shared the United Kingdom representative's view that formal votes should be avoided where possible in the interests of achieving consensus. If an indicative vote had been taken, the Belgian proposal could have been discussed notwithstanding its late submission.

Article 1, proposals for new subparagraphs (continued)

50. Mr. RUSTAND (Sweden), introducing his delegation's proposal to add a definition of "carrier" in article 1 (A/CONF.152/C.1/L.28), said that the underlining in the text should be deleted. It was suggested that the proposed definition should be inserted as subparagraph (b), the subsequent subparagraphs being renumbered accordingly.

51. The proposed definition had been prompted by the amendments to the second sentence of article 1 (a) and the introduction of the word "carrier". If there were no definition of the concept of carrier, it would be unclear whether the word referred to the performing carrier or the contracting carrier. The Hamburg Rules provided guidance in that respect. Secondly, it would be unclear whether it referred to the servants, agents and other persons used by the carrier for the performance of the carriage contract. The Multimodal Convention provided the necessary guidance in that regard, since the draft Convention now under consideration was intended to cover all goods irrespective of the mode of transport. Thirdly, a definition of the term "carrier" would avoid the problem of conflicting definitions in the various transport conventions and contribute in some measure to the unification of law. He drew attention to the different conceptions prevailing in different countries in relation to the Hague-Visby Rules and the Hamburg Rules. Finally, without such a definition, the somewhat hastily adopted amendment to the last sentence of article 1 (a) would make the draft Convention less attractive to many countries that might otherwise have acceded to it.

52. The CHAIRMAN invited the Conference to consider whether a definition of the term "carrier" was needed or whether it was adequately defined in existing conventions and domestic legislation.

53. Mr. FILIPOVIĆ (Yugoslavia) expressed support for the very broad definition of "carrier" in the Swedish proposal, covering the carrier's servants, agents and independent contractors. The amendments introduced to article 1 (a) at the previous meeting would otherwise have left a gap in the draft Convention, in which the definition of "carrier" would have been open to interpretation.

54. Mr. SWEENEY (United States of America) said that his delegation would have difficulty in accepting a definition of "carrier" at the present stage of the deliberations. The proposed Convention was not a carriage convention; it sought to deal with the problem of a period not covered by existing carriage conventions that was an essential stage in the movement of goods in international trade. The Swedish proposal would add yet another definition to existing definitions in the various transport conventions and was indeed at variance with some of them. For that reason he would prefer to avoid any definition of "carrier". However, if some definition was considered necessary as a result of the amendments to article 1 (a) adopted at the previous meeting, he would suggest that the relevant conventions covering the different modes of transport should be identified and that, for the purposes of the draft Convention, a carrier should be deemed to be whosoever was so defined in terms of those conventions, with the possible addition of the Hamburg Rules and the Multimodal Convention, which were expected to enter into force in the near future. Adding that the term "other persons" in the Swedish proposal presumably referred to independent contractors, he reminded the Conference that the liability of independent contractors had been considered during the discussions on the Hague-Visby Rules and the Hamburg Rules but had been rejected.

55. Mr. WALL (United Kingdom) said that he appreciated the arguments put forward by the United States delegation, but considered it appropriate to include some single, broad definition of "carrier" in article 1, now that the word appeared in article 1 (a). He suggested that informal consultations should be held to work out a satisfactory alternative to the Swedish proposal, along the lines of the United States delegation's suggestion that a definition should be based on the definitions contained in existing conventions.

56. Ms. SISULA-TULOKAS (Finland) said that her delegation, representing a country with the same legal background as Sweden, supported the Swedish proposal. The fact that definitions existed in a variety of existing or future conventions did not dispose of the problem at hand.

57. Mr. BONELL (Italy) expressed support for the United Kingdom suggestion to seek a different definition of "carrier" for the purposes of the draft Convention, along the lines suggested by the United States delegation.

58. The CHAIRMAN, summing up the discussion, said that the Conference had before it a Swedish proposal which had been supported. The United States delegation had put forward the idea, which had also received support, that any definition should merely refer to conventions already in force. He therefore suggested that a vote should be taken on the Swedish proposal, leaving open the possibility for delegations wishing to draft a definition based on existing conventions to hold consultations and submit an alternative proposal.

59. Mr. HERBER (Germany) said that his delegation, like the United States delegation, was opposed to the definition contained in the Swedish proposal; it had indeed some doubts as to whether an acceptable definition could be found. He suggested that a vote should be deferred until the conclusions of the informal working group proposed by the United Kingdom delegation were known.

60. The CHAIRMAN said he took it that the Committee agreed to the proposal by the United Kingdom delegation to set up a working group to determine whether a definition of "carrier" should be included and, if so, how it might be drafted. The Committee would return to the discussion when the working group had completed its work.

61. It was so agreed

62. Mr. WALL (United Kingdom) said that both Mexico and the International Road Transport Union (IRU) had proposed that there should be a definition of the term "person". The standard definition was that the term included both physical and juridical persons; his delegation considered that there would be no harm in including such a definition in the draft Convention.

63. Mr. ABASCAL (Mexico) said that the position of his Government was that there was some uncertainty, not about the strict definition of the term "person", but about the "person entitled to take delivery of the goods", an expression used in several articles of the draft Convention. However, because of the difficulty of formulating a definition and for reasons of time, Mexico had decided not to submit a specific proposal.

64. The CHAIRMAN said that the Mexican representative's explanation supported his own conclusion, which was in conformity with the rules of procedure, that it would not be advisable to reopen the debate every time a proposal or a new idea was put forward. He reminded the Committee that observations made by Governments between the forty-fourth session of the United Nations General Assembly and the convening of the current session of the Conference would be examined only if submitted in writing at the Conference itself.

65. Mr. WALL (United Kingdom) said that his delegation wished to give formal notice that the United Kingdom would submit a proposal concerning the definition of the term "person" and requested that the discussion on article 1 should be left open to allow the Conference time to consider that proposal.

66. The CHAIRMAN confirmed that, since it was the first time that that particular question was being discussed, the debate on article 1 would remain open for a discussion on the definition of the term "person". He requested the United Kingdom delegation to ensure that any proposals were received in good time.

67. Mr. WALL (United Kingdom) said that his delegation reserved the right to introduce a proposal at any time during the Conference as and when the United Kingdom deemed it appropriate to do so.

68. Mr. SOLIMAN (Egypt) drew attention to certain drafting inconsistencies between the Arabic and English versions of article 1 (a), (d), (e) and (f). The Egyptian delegation had submitted written amendments to the Arabic text, which it hoped would be taken into account.

69. The CHAIRMAN said that the Drafting Committee would be advised of the inconsistencies between the Arabic and English versions.

The meeting rose at 12.30 p.m.

UNITED NATIONS

GENERAL ASSEMBLY

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10 April 1991

ORIGINAL: ENGLISH

UNITED NATIONS CONFERENCE ON THE LIABILITY OF OPERATORS OF TRANSPORT TERMINALS IN INTERNATIONAL TRADE

FIRST COMMITTEE

SUMMARY RECORD OF THE 4th MEETING

Held at the Austria Center Vienna,
on Thursday, 4 April 1991, at 2.30 p.m.

Chairman: Mr. BERAUDO (France)

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Article 3

Election of a vice-chairman and a rapporteur

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Any corrections to these records will be consolidated in a single corrigendum, to be issued shortly after the end of the Conference.

V.91 37039 0050E

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Distr.: 12 April 1991

The meeting was called to order at 2.55 p.m.

CONSIDERATION OF ARTICLES 1 TO 16 AND 20 OF THE DRAFT CONVENTION ON THE LIABILITY OF OPERATORS OF TRANSPORT TERMINALS IN INTERNATIONAL TRADE (agenda item 3) (continued) (A/CONF.152/5, 6, 7 and Add.1 and Add.1/Corr.1 and Add.2)

Article 3 (A/CONF.152/C.1/L.9, L.33, L.34, L.36)

1. The CHAIRMAN explained that the proposal by Germany in document A/CONF.152/C.1/L.9 was obsolete, since it was consequential upon the German proposal for the first sentence of article 1 (a), which had been withdrawn (A/CONF.152/C.1/SR.1, para. 12).

2. Mr. ROMAN (Belgium), introducing the proposal in document A/CONF.152/C.1/L.33, said that its object was to place a time-limit on the responsibility of the operator for the goods in the event that the person entitled to take delivery of them failed to do so.

3. Mr. MORAN (Spain) supported the idea of such a time-limit but pointed out that the provision in draft article 10 for a right of retention carried that implication since no operator would detain goods in the terminal for such a long period that the cost to him became prohibitive. It therefore seemed unnecessary to prescribe a time-limit in article 3.

4. Ms. SISULA-TULOKAS (Finland) welcomed the addition proposed by Belgium, which would clarify the point at which the operator's responsibility ceased.

5. Mr. LARSEN (United States of America) agreed with the representative of Spain that article 10 had a bearing on the matter. His delegation had submitted a proposal for a new paragraph to article 10 (A/CONF.152/C.1/L.15) which would have the same effect as the Belgian proposal, by establishing a time-limit after which the goods could be considered to be abandoned and be taken into the operator's possession. He suggested that the issue be held in abeyance until the Committee was ready to deal with draft article 10.

6. The CHAIRMAN observed that the duration of the operator's responsibility for the goods and his right of retention were separate legal issues. However, there was a degree of overlap between them.

7. Mr. HERBER (Germany) had grave doubts about the Belgian proposal. It was not clear when the specified period of 30 days would begin, and the "period stipulated in the contract" might be as short as two days, which would be unacceptable. Moreover, questions related to the nature, conclusion and violation of the contract were all governed by domestic law, which would also govern the liability of the operator if the person entitled to take delivery of the goods failed to do so.

8. Mr. SULEIMAN (Nigeria) supported the Belgian proposal. It merely sought to limit the responsibility of the operator to the period in which the cargo was in his hands. The effects of the Convention would be confined to that period.

9. Mr. SAFARIAN NEMATABAD (Islamic Republic of Iran) said that in its existing form draft article 3 already provided a logical framework for the operator's responsibility by limiting it to the time during which he had charge of the goods.

10. Mr. LAVIÑA (Philippines) thought the issue of limitation of responsibility was sufficiently covered in draft article 10. Moreover, there was provision in draft article 5 (3) and (4) for the liability of the operator in certain circumstances. Delay in handing over the goods was covered by paragraph 4 of that article. He therefore favoured article 3 in its existing form.

11. Mr. WALL (United Kingdom) said that as matters stood, there was some difficulty in specifying exactly when the operator's period of responsibility began and ended. The phrase "at the disposal of" was ambiguous. As he saw it, the operator was responsible for the goods from the time the carrier or another person delivered them into his sole charge until such time as he handed them to another person entitled to take delivery of them. If nobody took delivery, the conditions specified in draft article 10 would take effect. Draft article 3 could perhaps be formulated more clearly.

12. Mr. ROMAN (Belgium) pointed out that the delay referred to in article 5 (3) was delay caused by the operator himself, whereas the delay referred to in his delegation's proposal was caused by the person who failed to take delivery, a situation for which the operator could not be responsible.

13. Mr. RUSTAND (Sweden) observed that in some countries the phrase "placed at the disposal of" had a specific legal meaning, requiring the customer to be notified that the goods awaited collection. If it was felt that those words were not sufficiently clear to determine the time at which the operator's responsibility ceased, an amendment introducing a requirement for the operator to give written notice of discharge would produce the desired effect. He could not agree with the representative of Germany that the operator's responsibility should continue as long as he had charge of the goods.

14. Mr. TARKO (Austria) said that article 3 and article 10 dealt with different issues: article 3 defined the period for which the operator was responsible for the goods in his charge, whereas article 10 dealt with the circumstances in which he had a right to retain them to defray his costs. The two issues should not be confused.

15. Mr. ZHAO Chengbi (China) thought the period of the operator's responsibility was clearly defined in the existing draft article 3. It extended from the time when the operator took charge of the goods until the moment when he handed them to the person entitled to receive them. Failure by the customer to take delivery of the goods was a separate issue, to which draft article 10 was applicable. The Belgian proposal merited close attention in that context.

16. Mr. LARSEN (United States of America) favoured the text of article 3 as it stood. The question of the operator's responsibility could be reconsidered in the context of article 10.

17. Mr. HORNBY (Canada) opposed the Belgian proposal. It did not dispel the potential ambiguity in draft article 3 concerning the period of the operator's responsibility, nor make it clear when the 30-day period would begin to run. He would prefer a simpler form of words.

18. Mr. ABASCAL (Mexico) said that his delegation preferred the text as it stood. Article 3 dealt only with the period of responsibility of the operator. It was a generally accepted rule of law that that responsibility ceased when the goods taken in charge were handed over to the person entitled to take delivery of them or were placed at that person's disposal. Rights of retention or sale were dealt with in article 10.

19. Mr. ROMAN (Belgium) said that it was important to realize that the proposed period of 30 days could enter into effect from the moment the operator took the goods in question in charge. In some cases it might be difficult or impossible for the operator to give notice to the person entitled to take delivery, who might be unknown; that problem could be met by limiting the period of responsibility to 30 days or to the period stipulated in the contract.

20. The CHAIRMAN invited the Committee to vote on the Belgian proposal (A/CONF.152/C.1/L.33).

21. The proposal was rejected by 26 votes to 3.

22. Ms. SISULA-TUKOLAS (Finland), introducing her delegation's proposal (A/CONF.152/C.1/L.36), said that its purpose was to clarify the notion of placing the goods at the disposal of the person entitled to take delivery of them. Where the customer or the operator of the transport terminal was in delay, it should not be enough for the operator simply to declare that the goods were at the customer's disposal. Some sort of notification should be necessary to determine the time at which the operator's responsibility ceased. Her own preference was for the first alternative proposed by her delegation.

23. Mr. RUSTAND (Sweden) said that he supported the Finnish proposal in principle, although it was to some extent superfluous. In Swedish law, the notion of placing at disposal included giving notice to the customer and inviting him to collect the goods. However, if adding a requirement to give notice would answer the concerns of any other delegation, his delegation would support it.

24. Mr. SWEENEY (United States of America) said that he could not support the proposal. It would add to the Convention a mandatory requirement for the operators of transport terminals which was not part of their normal business. It was, in fact, part of the carrier's responsibility to notify the consignee that the goods had arrived and were ready to be picked up. In maritime transport such notification was essential and documents for sea and land transport contained an entry giving the name of the "notify party". An airway bill required a similar entry. There was no need to confer the further obligation on the operator to give notice that might not be necessary.

25. Mr. LAVIÑA (Philippines) preferred the second alternative proposed by Finland although it specified no time-limit after the receipt of notice. He felt there was no need to amend article 3.

26. Mr. WALL (United Kingdom) said that his delegation believed the more precise the Convention was, the more likely would be its acceptability to a large number of people. His delegation therefore found considerable merit in the Finnish proposal, although it might be better to redraft the article altogether. If the Finnish proposal was accepted, it must be made clear that the person entitled to take delivery of the goods had received prior notice that they had been placed at his disposal. Whatever additional burden that might involve for the operator, it would have the benefit of giving a starting point from which to calculate what other measures might need to be taken, if, for example, the goods were abandoned. His delegation intended to submit a redrafted version of article 3, but it would in the meantime support the second Finnish alternative if the word "prior" was added to it before the word "notice".

27. Mr. RUSTAND (Sweden) said that his delegation opposed the second alternative because it would mean that the operator would need to await some proof of the receipt of notice. It did not, however, believe that giving notice, as the first alternative provided, would place a new duty on the shoulders of the operator; rather it would be in his interest, enabling him to avoid continued responsibility for goods which had not been collected. The first alternative was a valuable clarification of article 3.

28. Mr. ABASCAL (Mexico) said that the Finnish addition should not be regarded as imposing a further duty on the operator but as a means of ending the period of responsibility. His delegation was not prepared to go so far as to require the article to stipulate proof of receipt of the notice. It therefore favoured the first alternative.

29. Mr. BONELL (Italy) said that article 3 had been intended to meet the situation in which the person entitled to take delivery of the goods did not appear to collect them; in such a case, it was not the operator that was in default. Why, therefore, should he be obliged to give notice? Where the consignee had lost all interest in the goods, it might be very difficult to give notice. The requirement to give notice would not only place an unjustified additional burden on the operator but might prove impossible to fulfil. His delegation could not support the Finnish proposal.

30. Mr. ZHAO Chengbi (China) reiterated his delegation's view that article 3 should deal solely with the period of responsibility, a matter which was adequately covered by the Commission's draft. The article had no place for such specific issues as a period of notice or responsibility for notice. The Hamburg Rules contained no such requirement, only a provision establishing the conditions under which the goods were taken over and subsequently delivered. The non-appearance of the person entitled to take delivery of the goods would be covered by local laws and, for the purposes of the draft Convention, by article 10.

31. Mr. LEBEDEV (Union of Soviet Socialist Republics) said that the Committee should carefully consider what was meant by the phrase "has placed them [the goods] at the disposal of the person entitled to take delivery of them" and how that operation was to be carried out in physical terms. Article 3 as it stood did not clarify or define that point, although the procedure had to be conducted in accordance with specific rules. Article 4 (2) of the Hamburg Rules referred to the placing of the goods at the disposal of the consignee in accordance with the contract or with the law or with the usage of the particular trade, applicable at the port of discharge. The problem had been discussed by the Working Group on International Contract Practices, which had decided that article 4 (2) of the Hamburg Rules would have to be recognized as applying to the matters regulated by the draft Convention. However, since the draft Convention covered not only carriage by sea but also other forms of carriage, the Working Group had decided not to include in the draft the wording which appeared in the Hamburg Rules but to leave it to be assumed that those rules applied none the less. That would be the normal way of resolving the question of what the phrase "place [the goods] at the disposal of" meant. Under the Finnish proposal, the procedure of placing goods at a person's disposal would require only one action, that of giving notice, which in turn meant that if notice had been given, no other action was required of the operator. He agreed with the United States that an additional burden would be placed on the operator if the Finnish proposal was accepted, because in practice in in some cases it was sufficient for oral notice to be given instead of written notice, as defined in article 1. On the other hand, in some countries local usage might require additional measures to be taken, so that any attempt to solve the

(Mr. Lebedev, Union of Soviet Socialist Republics)

question by means of an international convention might not be very effective. For all of those reasons, the formulation of article 3 which appeared in the Commission's draft might be the best way of solving the problem.

32. Mr. ROMAN (Belgium) said that the statement made by the representative of Italy clearly reflected his delegation's concern with draft article 3 and the reasons why it had proposed an amendment to it.

33. Mr. WALL (United Kingdom) said that it was important to ensure that the draft Convention did not lean too heavily on the rules contained in any single convention dealing with any particular transport mode. The United Kingdom would have difficulties with it being overdependent on the Hamburg Rules as other States might have with it being overdependent on other conventions. The draft Convention had to fit neatly into the gaps between the other transport conventions but as far as possible had to be self-contained. In the light of the discussion, and particularly the statement by Italy, the United Kingdom delegation now felt that no more should be required of the operator than to make reasonable efforts to give notice.

34. Ms. JORGENSEN (Denmark) said that the goods might be sold many times while in possession of the operator. That being so, the operator might not readily know the identity of the person entitled to take delivery of them, in which case there could be no rule requiring him to give the notice to which the Finnish proposal referred.

35. After an exchange of views on how the Finnish proposal might be reworded to cater for the views expressed by delegations, and with the approval of Ms. SISULA-TUKOLAS (Finland), Mr. WALL (United Kingdom) proposed the following text as a revised form of the first Finnish alternative: "and he has sought to give reasonable prior notice thereof to that person".

36. Mr. LAVIÑA (Philippines) said that his delegation disliked the United Kingdom wording because it was uncertain as to whether the wording required the operator to succeed in giving the notice and the person concerned to receive it. The wording placed overdue emphasis on the operator's efforts and failed to specify a period of time during which the consignee could obtain the goods. His delegation therefore continued to prefer article 3 as it stood. It endorsed the views put forward by the representatives of the United States and the Soviet Union.

37. Mr. SULEIMAN (Nigeria) suggested specifying that the notice might be served by the operator either directly or indirectly, thus ensuring that an undue burden was not placed on the operator and that the requirements of local laws in many parts of the world were taken into account.

38. Mr. TARKO (Austria) said that he was satisfied with the formulation of article 3 as it stood and also had some sympathy for the first Finnish alternative in its original form. As revised by the United Kingdom, it caused his delegation problems. Austria would prefer it to read: "and he has given or sought to give prior notice thereof to that person".

39. Mr. ROJANAPHRUK (Thailand) submitted that the first Finnish alternative, as revised by the United Kingdom introduced unwelcome elements of subjectivity and imprecision into the Commission's draft; it would also have the undesirable effect

(Mr. Rojanaphruk, Thailand)

of placing an additional burden and responsibility on the operator. For his part, he found the Commission's text adequate; if a question of notice were to be involved, it should be the responsibility of the person entitled to take delivery to notify the consignee as soon as the goods were placed at his disposal.

40. Mr. AIT HMID (Morocco) fully endorsed the remarks made by the representative of the Philippines.

41. Mr. RUSTAND (Sweden) said that surely what was at issue was whether or not the operator, when placing the goods at the disposal of the customer, should accept the additional burden - which he himself considered a minor one - of making reasonable efforts to give notice thereof.

42. Mr. WALL (United Kingdom), responding to the comments made by the representatives of Austria and Sweden, suggested the following further revision of the first Finnish alternative: "and has given or made reasonable attempts to give prior notice thereof to that person".

43. The CHAIRMAN put to the vote the second wording suggested by the United Kingdom for the addition to article 3 proposed by Finland.

44. The wording was rejected by 22 votes to 8, with 3 abstentions.

45. Mr. ABASCAL (Mexico) introduced the proposal in document A/CONF.152/C.1/L.34, which was intended to ensure that the Convention specified clearly the time when the operator's responsibility began. It was motivated by a situation common in respect of certain goods in some Mexican ports, and possibly met with in other countries as well: when goods had been unloaded from a ship - and the carrier's responsibility had therefore ended - the warehouse operator failed to take them in charge immediately, and subsequently denied all responsibility for them during what had come to be known as el periodo de nadie, a time when they were nobody's concern. That was obviously a most undesirable state of affairs, which his delegation's proposal sought to remedy.

46. Mr. WALL (United Kingdom) commended the words "when the goods are delivered to him" in the Mexican proposal for its precision in situating the beginning of the operator's responsibility. That being said, he did not believe that the Mexican amendment would be of any great benefit to the article, on which his delegation reserved its final position.

47. Mr. TARKO (Austria) agreed that the amendment would contribute little to the article. Not only was the first part of the text somewhat difficult to understand; it also seemed quite clear from the definition in article 1 (a) that a person who failed to take goods in charge could not be considered an operator for the purposes of the draft Convention.

48. Mr. ABASCAL (Mexico) withdrew his delegation's proposal.

ELECTION OF A VICE-CHAIRMAN AND A RAPPORTEUR (agenda item 2)

49. Mr. LAVIÑA (Philippines) said that the members of the group of Asian States, were ready to assume any responsibilities that might be assigned to them in the conduct of the Committee's proceedings. They found the continued absence of a

(Mr. Laviña, Philippines)

rapporteur in the First Committee disquieting. Moreover, they regretted that the Conference had not yet appointed a Credentials Committee and elected all its officers.

50. Mr. ABASCAL (Mexico), speaking as President of the Conference, called for the speediest possible nominations for the Credentials Committee and the outstanding posts on the General Committee.

The meeting rose at 5.35 p.m.

UNITED NATIONS

GENERAL ASSEMBLY

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11 April 1991

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UNITED NATIONS CONFERENCE ON THE LIABILITY OF OPERATORS OF TRANSPORT TERMINALS IN INTERNATIONAL TRADE

FIRST COMMITTEE

SUMMARY RECORD OF THE 5th MEETING

Held at the Austria Center Vienna,
on Friday, 5 April 1991, at 9.30 a.m.

Chairman: Mr. BERAUDO (France)

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Any corrections to these records will be consolidated in a single corrigendum, to be issued shortly after the end of the Conference.

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The meeting was called to order at 9.45 a.m.

CONSIDERATION OF ARTICLES 1 TO 16 AND 20 OF THE DRAFT CONVENTION ON THE LIABILITY OF OPERATORS OF TRANSPORT TERMINALS IN INTERNATIONAL TRADE (agenda item 3) (continued) (A/CONF.152/5, 6, 7 and Add.1 and Add.1/Corr.1 and Add.2)

Proposal for new article (A/CONF.152/C.1/L.31)

1. Mr. WALL (United Kingdom), introducing his delegation's proposal (A/CONF.152/C.1/L.31) for the inclusion of a new article at an appropriate place in the draft Convention, said that it stemmed in part from the discussion on article 1 and was also related to the requirements for the issuance of a document under article 4. Its purpose was to introduce an element of precision into the text of the draft Convention by ensuring that the application of the Convention was clearly indicated. In connection with paragraph (1), it should be stressed that the decision of the carrier or other person having an interest in the goods to provide the operator with a notice indicating that the goods were involved in international carriage was optional. As stated in paragraph (2), written acknowledgement by the operator of receipt of such a notice would be considered prima facie evidence of the applicability of the Convention.

2. Mr. BONELL (Italy) said that, given the definition of international carriage in article 1 (c), he saw no need for express notification of the international character of the carriage as provided for in paragraph (1) of the proposal. As regards paragraph (2), he failed to see why notification that the goods were involved in international carriage should be taken only as prima facie evidence of the applicability of the Convention.

3. Mr. MORAN (Spain), endorsing the comments made by the previous speaker, said that, since paragraph (2) of the proposal seemed to refer more to the scope of application of the draft Convention and was directly related to article 2 (1), consideration of the proposal as a whole should be deferred until the discussion on article 2.

4. Mr. LAVIÑA (Philippines) doubted the need for the proposed paragraph (1) in view of the definition of international carriage given in article 1 (c). Moreover, the international character of the carriage should not be determined by one of the parties unilaterally. He shared the Italian delegation's misgivings about paragraph (2); there again, a unilateral action by one party should not determine the applicability of the Convention.

5. Mr. RUSTAND (Sweden) considered the proposal somewhat superfluous, since it could be assumed that all parties would try to protect their interests by making sure that the operator was aware that the goods were involved in international transport. With regard to paragraph (2), the United Kingdom delegation's aim could be met by amending the wording of article 4 (1) to include the identification of the goods "as being involved in international carriage". He too failed to see why such notification should be only prima facie evidence; any court would deem it conclusive evidence.

6. Mr. ROMAN (Belgium) expressed full support for the United Kingdom proposal as a necessary clarification of the terms of the draft Convention.

7. Mr. WALL (United Kingdom) said that the statements by previous speakers showed clearly that there was a need for greater precision, although there was also perhaps some concern that too much emphasis on precision might be counter-productive. He assured the representative of the Philippines that the

(Mr. Wall, United Kingdom)

proposal was not intended to endorse unilateral action. He drew attention to the optional character of paragraph (1). Paragraph (2) provided that, if the operator acknowledged receipt of the notice in question, that would be evidence of the applicability of the terms of the Convention. He was willing to reconsider whether the evidence should be regarded merely as prima facie. He would endeavour to draft a new proposal for inclusion in article 4, failing which he would ask that the proposal now under consideration should be discussed afresh as a separate article.

Article 1, proposals for new subparagraphs (A/CONF.152/C.1/L.5) (continued)

8. Mr. LAVIÑA (Philippines) drew attention to certain outstanding questions relating to article 1, particularly the United States proposal concerning the definition of the term "writing" (A/CONF.152/C.1/L.5).

9. The CHAIRMAN said that it had been decided that the Drafting Committee would take account of the United States' concern by ensuring that electronic writing was covered by the formulation used in the Convention with reference to any writing, request or notice.

10. Mr. LAVIÑA (Philippines) said that the United States proposal did not solely concern the inclusion of electronic writing in the definition of the term "writing", but would have implications for many important articles of the draft Convention concerning notices and requests. The Drafting Committee was established primarily to consider questions of style and was not authorized to deal with substantive issues, which should be dealt with in the main Committees.

11. The CHAIRMAN said that he understood the Committee to have taken a decision in the matter.

Article 4 (A/CONF.152/C.1/L.10, L.26, L.35)

12. Mr. OCHIAI (Japan), introducing his delegation's proposal for the insertion of a new paragraph (1 bis) in article 4 (A/CONF.152/C.1/L.26), said that under the provisions of article 4 (1), the operator could be obliged to sign or issue a document even after a suit had been brought against him by the customer. That was undoubtedly not the intention behind the article, and the purpose of the proposal was to subject customers' requests to a time limit.

13. Mr. MORAN (Spain) said that the aims of the Japanese proposal were already met by the substance of article 4 (1); he would therefore prefer to leave the text as it stood.

14. Mr. RUSTAND (Sweden) said that it was clear from the wording of the existing paragraph that either the operator or the customer would raise the question of documentation immediately after the goods had been handed over in the terminal. He did not think that a long period of time would elapse before any of the parties sought to ensure the existence of documentation referring to the handling of the goods. The idea behind the wording "within a reasonable period of time" in the first line of article 4 (1) was that the operator should be allowed sufficient time to issue the document. His delegation was therefore in favour of keeping the existing text of article 4 (1).

15. Mr. OCHIAI (Japan) said that in view of the Swedish representative's comments, his delegation was prepared to withdraw its proposal.

16. The CHAIRMAN invited the Committee to consider the proposal made by Mexico to add a sentence to article 4 (3) (A/CONF.152/C.1/L.35).

17. Mr. ABASCAL (Mexico) said that his proposal was based essentially on comments made by the International Maritime Committee and used the wording contained in the 1990 revision of Incoterms.

18. Mr. RUSTAND (Sweden) said that it was essential not to exclude any modern means of communication. In his view, a message was something that could be immediately transformed into a document or a record of some sort.

19. Mr. ABASCAL (Mexico) said that an electronic message was not necessarily a document. On the other hand, however, the 1990 revision of Incoterms took account of documents and electronic messages used in the international carriage of goods.

20. Mr. BERGSTEN (Executive Secretary) said that the words "which preserves a record of the information contained therein" in article 4 (3) were intended to include any form of communication that would preserve a record. The text was clearly intended to include data contained in a computer. In his view, therefore, the Mexican proposal was not necessary.

21. Furthermore, articles 1 (e) and (f) used language similar to that found in the two uniform Conventions adopted in Ottawa and in the UNCITRAL Model Law on International Commercial Arbitration, which was becoming accepted as the appropriate formulation when moving from the requirement for a paper-based record to one that might be in a magnetic form or a laser disc.

22. Mr. ABASCAL (Mexico) said that in view of the explanation given by the Executive Secretary, his delegation was willing to withdraw its proposal and to leave the matter to the Drafting Committee.

23. Mr. LARSEN (United States of America) said that in light of the statement made by the Executive Secretary, it would not be necessary to consider the matter any further.

24. Mr. MESCHERYAK (Ukrainian Soviet Socialist Republic) agreed with the United States representative and thought that there was no great need to include in the draft Convention a statement referring to an equivalent electronic data exchange message.

25. Mr. BONELL (Italy) said that if the relevant provision of the 1990 revision of Incoterms stated that a document might be replaced by an equivalent electronic data interchange message, it was then essential for some similar formula to be included in the draft Convention, because otherwise it would be assumed that, for the purposes of the Convention, a document must be in the traditional form.

26. The existing text of article 4 (3) referred to only one of the two possibilities mentioned in paragraph (1), that in subparagraph (b). However, reference should also be made to subparagraph (a). In his opinion, therefore, if paragraph (3) was amended to include a text indicating that the document might be replaced by an equivalent electronic data interchange message, that would cover both situations and introduce a necessary clarification.

27. Mr. TARKO (Austria) said the Drafting Committee should be informed of the fact that there was a fundamental difference between article 1 (e) and (f) and article 4 (3) since under the former all forms were acceptable. In his opinion, a document was something written on a piece of paper, and therefore the operator would have to give the customer a paper of some kind.

28. Mr. LAVIÑA (Philippines) thought that the clarification given by the Executive Secretary had resolved the issue. The Mexican proposal could perhaps be reflected by inserting in article 4 (3), after the words "in any form", the words "including an equivalent electronic data interchange message". The question would be amply covered by articles 1 (e) and (f).

29. Mr. ZHAO Chengbi (China) said that the form of the document was of great importance. For instance, the customer might have to submit a document to the court in order to resolve a conflict. His delegation believed that the draft Convention should fully reflect developments in modern technology. The 1990 revision of Incoterms contained the same idea and referred to an equivalent electronic data interchange message. His delegation therefore supported the Mexican proposal.

30. Mr. MUTZ (Central Office for International Railway Transport), speaking at the invitation of the Chairman, agreed with the Executive Secretary that the wording used in article 4 (3) was broad enough to cover electronic data interchange messages. He noted that the expression "electronic data interchange message" had a specific meaning in the EDIFACT rules adopted by the Economic Commission for Europe. That terminology would be widely used in international trade in the next decade and could be reflected in the draft Convention. Article 4 (3) could be amended to read: "The document may, inter alia, be replaced by an equivalent electronic data interchange message".

31. Mr. RUSTAND (Sweden) said he was prepared to accept the Mexican proposal, but only if it was made clear that an electronic data interchange message would be the equivalent of a document in the sense that it would preserve a record of information. The protection provided for the customer under paragraph (1) (b), which ensured that he would have concrete evidence to produce in court in the event of any subsequent dispute, should not be weakened. The Committee needed to be quite sure whether or not an electronic message would preserve a record of information before taking a decision.

32. Mr. RAO (India) agreed that the only point that now needed clarification was whether an electronic data interchange message would be a valid substitute for a document in the sense that it would preserve a record of information. If it would not, then a question of substance was involved, and the Mexican proposal would need further discussion. If it did preserve such a record, however, then the Mexican proposal could perhaps be transmitted to the Drafting Committee for study in the context of article (1) (e) and (f) and article (4) (3).

33. Mr. BERGSTEN (Executive Secretary) read out the relevant provisions of Incoterms 1990. Under those provisions, it was one of the obligations of the seller to give the buyer notice that the goods had been delivered on board. Where such notice did not take the form of a transport document, the seller was also obliged to assist the buyer in obtaining a transport document, such as a negotiable bill of lading, a non-negotiable seaway bill, an inland waterway document, or a multi-modal transport document. Where the seller and the buyer had agreed to communicate electronically, such a document could be replaced by an equivalent electronic data interchange message.

34. Mr. WALL (United Kingdom) urged that to avoid any possibility of confusion it should be made absolutely clear in article 4 that the document referred to in paragraph (1) (a) should also preserve a record of the information contained therein. In other words, there should be no doubt that there was no difference between the documents referred to in the two subparagraphs, in the sense that they were both records.

35. Mr. LARSEN (United States of America) pointed out that under the Convention for the Unification of certain Rules Relating to International Carriage by Air (the Warsaw Convention), and also under the Montreal Protocol No. 4 thereto, it was already open to the operator to issue the document concerned in electronic form.

36. Mr. BONELL (Italy) said he was glad to note that other delegations shared his concern at the fact that paragraph (1) (a) was excluded from the scope of paragraph (3). That inconsistency should be eliminated, and he therefore proposed that the wording of paragraph (3) should be amended accordingly. The rest of the text of the article should remain unchanged, but with the addition of a formulation along the lines of the Incoterms provision concerning a prior agreement between customer and operator to communicate electronically.

37. The CHAIRMAN pointed out that, while the revised Incoterms 1990 were of the greatest importance in international trade, the International Chamber of Commerce (ICC) was a private association, and a United Nations conference need not necessarily accept unquestioningly all the texts ICC had formulated. It was open to the Committee to approve other proposals if it considered them to have merit.

38. Mr. ROJANAPHRUK (Thailand) said after hearing the Incoterms provisions that had been read out by the Executive Secretary, it was now his view that the formulation of article 4 (3) could remain unchanged, since under article 4 (1) (b) it would be left to the discretion of the operator to issue the signed document in whatever form he considered appropriate. It was also made clear in article 4 (1) (a) that acknowledgement of receipt of the goods would be made only by signing a document presented by the customer at that customer's request. Such a document could take either the traditional form, or the form of an electronic data interchange message.

39. Mr. ROMAN (Belgium) said he had had the impression after hearing the Incoterms text read out that the document concerned need not necessarily be a separate paper, or message, but could simply be a provision in, for example, a bill of lading. Was that in fact the case?

40. Mr. BERGSTEN (Executive Secretary) said the Incoterms requirements he had quoted were for a form of transport document. While the document referred to under article 4 (1) (a) could well be a transport document of some kind, the document referred to in paragraph (1) (b) would of course not be, since it would be issued by the terminal operator.

41. Mr. ROMAN (Belgium) said that he was satisfied with that explanation.

42. The CHAIRMAN said he understood that the United States delegation had agreed that its proposal relating to article 4 (A/CONF.152/C.1/L.10) should be dealt with by the Drafting Committee, which would also take into account the various points raised during discussion on the subject of electronic writing. The Mexican representative having withdrawn his proposal, there were thus no further proposals on article 4 to be considered, apart from the oral proposal made by the Italian representative.

43. Mr. BONELL (Italy) said his proposal was to add to article 4 (3) a new sentence reading as follows: "When the customer and the operator have agreed to communicate electronically, the document referred to in paragraph (1) may be replaced by an equivalent electronic data interchange message".

44. Mr. WALL (United Kingdom) said that he had great difficulty in accepting the Italian proposal. He failed to see how, in the absence of any written record, a court could issue a ruling in a case arising in connection with subparagraphs (a) or (b) of article 4 (1).

45. Mr. ZHAO Chengbi (China) said that he accepted the idea of the Italian proposal, which reflected recognition of an important long-term development, but would prefer to see it expressed more briefly, e.g. by the insertion of the words "including electronic data interchange which is agreed between the customer and the operator in the process of business" after the words "issued in any form" in article 4 (3).

46. Mr. ABASCAL (Mexico) said that he supported the Italian proposal, which was not substantially different from the proposal originally made by his delegation and subsequently withdrawn in the light of explanations by the Executive Secretary.

47. Mr. LARSEN (United States of America) also supported the Italian proposal. The industry, whose concerns the Conference should endeavour to meet, had indicated a preference for the approach reflected in the proposal. The decision as to the precise place where the proposed new sentence should appear in the draft could be left to the Drafting Committee.

48. Mr. HERBER (Germany), Mr. OCHIAI (Japan) and Mrs. PIAGGI DE VANOSSI (Argentina) also expressed support for the Italian proposal.

49. Mr. RAO (India) said that he entirely agreed with the view expressed by the United Kingdom representative. In the absence of any record the determination of liability would become practically impossible.

50. The Italian proposal was adopted by 14 votes to 12, with 6 abstentions.

51. The CHAIRMAN, noting that a new sentence had now been added to article 4 (3), said that, unless he heard any objection, he would take it that the Committee understood the whole of that paragraph to refer to both subparagraph (a) and subparagraph (b) of paragraph (1).

52. Mr. LEBEDEV (Union of Soviet Socialist Republics) asked whether the agreement between the parties referred to in the second sentence of paragraph (3) just adopted by the Committee had to be concluded in written form or could be an oral one.

53. The CHAIRMAN said that, as he understood the matter, the fact of the sender and receiver of the message being electronically linked was in itself sufficient evidence of agreement.

54. Mr. BONELL (Italy) endorsed that interpretation.

55. Mr. LEBEDEV (Union of Soviet Socialist Republics) noted that any form of agreement, including oral agreement, would be acceptable, electronic methods being a particular case. A further point on which elucidation would be welcome was whether electronic data interchange could be used only in the event of agreement

(Mr. Lebedev, Union of Soviet Socialist Republics)

between the parties, or, in other words, whether the first sentence of paragraph (3) was applicable in the absence of agreement.

56. Mr. BONELL (Italy) said that the first sentence of paragraph (3) remained applicable even without the agreement referred to in the second sentence.

57. The CHAIRMAN confirmed that the two sentences of paragraph (3) were not mutually exclusive, the second sentence being supplementary to the first.

58. Mr. BERGSTEN (Executive Secretary), speaking as Secretary of the Drafting Committee, asked whether the Drafting Committee would be authorized to add such words as "In addition" at the beginning of the second sentence so as to make it clear that a separate concept was being introduced.

59. The CHAIRMAN said that the Drafting Committee was free to make all necessary drafting changes.

60. Mr. ROJANAPHRUK (Thailand), speaking in explanation of vote, said that he had voted against the Italian proposal, not because he had any objection to the idea it contained but because, for reasons stated earlier, he considered it superfluous.

The meeting rose at 12.35 p.m.

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UNITED NATIONS CONFERENCE ON THE LIABILITY OF OPERATORS OF TRANSPORT TERMINALS IN INTERNATIONAL TRADE

FIRST COMMITTEE

SUMMARY RECORD OF THE 6th MEETING

Held at the Austria Center Vienna,
on Friday, 5 April 1991, at 2.30 p.m.

Chairman: Mr. BERAUDO (France)

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The meeting was called to order at 2.50 p.m.

CONSIDERATION OF ARTICLES 1 TO 16 AND 20 OF THE DRAFT CONVENTION ON THE LIABILITY OF OPERATORS OF TRANSPORT TERMINALS IN INTERNATIONAL TRADE (agenda item 3) (continued) (A/CONF.152/5, 6, 7 and Add.1 and Add.1/Corr.1 and Add.2)

Article 4 (continued) (A/CONF.152/C.1/L.31)

1. Mr. WALL (United Kingdom) said that article 4 as a whole caused his delegation considerable concern. The use of the word "customer" in paragraph 1, and nowhere else in the Convention, was a particular problem. While he was reluctant to suggest that the term should be defined in the Convention, it was important that there should be a clear understanding of what it meant in that particular context. The people who might present a document to the operator, or require one from him, included carriers, either delivering or collecting the goods, and persons with some form of interest in those goods at the first or last stage of their international carriage. While such people might have no contractual relationship with the operator, they would wish to be sure, on handing over an item to him, that he would provide a receipt indicating that the goods had been accepted by him and were in good condition. The Committee might wish to consider whether the term "customer" was appropriate for that purpose.

2. He had found, in seeking to incorporate into article 4, his delegation's proposal in document A/CONF.152/C.1/L.31, that there was a clash between the notion of a carrier or other person with an interest in the goods and the notion of customer as used in the article. Under subparagraph (a) of article 4 (1), the customer would present a document which was to be signed by the operator. That document would identify the goods and - if the text suggested by the United Kingdom was incorporated into the article - would also indicate that they were involved in international carriage. The introductory wording of article 4 (1), however, gave the operator the option of acknowledging his receipt of the goods by signing that document or of himself issuing the signed document described in subparagraph (b); the latter document might also acknowledge that the goods were involved in international carriage. But under article 4 (2) the operator, by not acting in accordance with either of the subparagraphs of article 4 (1), would be the subject of a rebuttable presumption that he had received the goods in apparent good condition. That provision caused his delegation great difficulty. Moreover, it could see no justification for the exception set forth in the second sentence of paragraph 2, and suggested that it should be excluded from the draft.

3. He believed that the amendment which the Committee had made to paragraph 3 at the previous meeting did the paragraph a major disservice and, through it, a disservice to the article as a whole. Regarding paragraph 4, which closely followed the wording of article 14 of the Hamburg Rules, he suggested that a comma should be inserted between the word "printed" and the words "in facsimile". It was unfortunate that it had been omitted from the Hamburg Rules.

4. In his delegation's view, article 4, and paragraphs 1 and 2 in particular, compressed too many ideas together. The documents to which the article referred would be highly important and the Convention should make it very clear, possibly by adding further details, what their true intention was.

5. The CHAIRMAN suggested that the Committee might discuss the United Kingdom proposal in document A/CONF.152/C.1/L.31 and, if its substance was approved, seek a way of adapting it to article 4.

6. Mr. WALL (United Kingdom) said that he hoped he himself would be able to formulate his delegation's proposal in such a way that it would be amenable to incorporation into article 4. He would continue to work towards that end.

7. Mr. LAVIÑA (Philippines) said that, as it stood, paragraph 1 of article 4 was confusing and would need some drafting changes. His delegation was also concerned about the use of the words "rebuttably presumed" in the first sentence of paragraph 2. In the second sentence, did the phrase "no such presumption applies" mean that there would be no such rebuttable presumption, in other words that there would be a conclusive presumption, or no presumption at all? His delegation endorsed the view expressed by the representative of the United Kingdom on the use of the word "customer". In previous transport conventions and in other parts of the present draft the more technical term "interested party" was employed. He approved the suggestion that a comma should be inserted in paragraph 4 between the words "printed" and "in facsimile".

8. Mr. HERBER (Germany) said that his delegation also felt great concern about article 4. Paragraphs 1 and 2 contained a great number of ideas, not all of which had been clearly expressed. Paragraph 2, for example, dealt with the question of presumption: if the operator did not act in accordance with either subparagraph (a) or subparagraph (b) of paragraph 1, there would be a presumption that he had taken the goods in charge in apparent good condition. What happened, however, if he did issue a document saying that he had received the goods in good condition? Would that create a presumption and would it be a rebuttable one? The answer to both questions could only be in the affirmative. The document in question would not be a negotiable instrument and therefore any presumption which it created must be rebuttable. It was not sensible to imply, as paragraph 2 seemed to do, that, if the operator acted in accordance with subparagraphs 1 (a) or (b), his action would raise no presumption at all. It could be argued that, in that case, the presumption was self-evident but that was a highly dangerous approach.

9. He felt that the reason for the lapse lay in the changes that had been made in the draft during its elaboration. Originally, in the Hamburg Rules and in the UNIDROIT text, the rule on presumption had been restricted to someone who had the goods in charge and to the case where the document was issued, and it dealt only with the kind of presumption which the document raised. Paragraph 2 of the Commission's draft had turned the rule around and made failure to issue a document constitute a presumption that the goods had been received in good condition. The main point, what kind of presumption the document created, had been dropped. The text was unclear and needed further consideration.

10. Mr. ABASCAL (Mexico) said that the representative of the United States of America had agreed that his delegation's proposal for paragraph 4 (A/CONF.152/C.1/L.10) might be dealt with by the Drafting Committee. However, the omission of the substantive point implied by the words "if not inconsistent with the law of the country where the document is signed", which appeared at the end of article 4 (4) of the Commission's draft, could not be dealt with by the Drafting Committee.

11. The CHAIRMAN said that the discussion of article 4 in the First Committee had not been concluded. Moreover, what had been said since the United States had made that suggestion had shown that the situation in regard to electronic writing was not as simple as had appeared at first sight.

12. Mr. RUSTAND (Sweden) said he looked forward to studying the United Kingd anticipated reformulation in writing of its proposal in document A/CONF.152/C.1/L.31, with a view to the consideration of its incorporation in article 4. He would reserve his final comments on the article until he had s the new proposal. His delegation would have no objection to the replacement word "customer" by a more suitable term. As far as the rule of presumption w concerned, he had compared paragraph 2 of article 4 of the draft Convention w the text that had been before UNCITRAL at its twenty-second session, and had that the second sentence of the paragraph had been added at that session, alt the sessional report (A/44/17) did not show the reasons for the addition. Hi recollection was that it had been considered unfair to require an operator wh merely transferred goods from one means of transport to another to take the documentary action for which the article called, and still more unfair if fai to do so were to create the presumption in question. That was the reason for exception expressed in the second sentence. He endorsed the suggestion that comma should be inserted in paragraph 4 between the words "printed" and "in facsimile" and wished to reserve his position on the very interesting and dif point raised by the representative of Germany.

13. Mr. MORAN (Spain) said that his delegation approved article 4 as it sto was confident that the doubts expressed about it could be solved by looking Convention as a whole. The representative of Germany had believed that para would raise a presumption. According to the Spanish legal system, and perha others, the presumption would be that at the time of acting the operator had exercised reasonable diligence. If the customer presented a document to the operator which the latter signed, then the goods would be presumed to have b received in good condition, as evidenced by the signed document. That presu would exist, but - as could be deduced from article 6 - the operator might b to show that damage to the goods had been caused by another person's fault, which case he would not be held liable solely by virtue of his signature.

14. The second possibility offered by article 4 (1) was that the customer d present a document but waited for the operator to provide one; the operator then be able to check the goods and in reasonable time issue a document whic created a presumption as to the circumstances in which the goods had been fo whether or not anything had happened to them while in the terminal. The thi possibility was where the operator neither issued a document nor signed that to him by the customer, which was the case to which paragraph 2 referred. A there would be a presumption, unless proved otherwise, that the goods had be handed over in good condition; it was logical that the presumption should f only after it had been demonstrated that the goods had not been received in condition, as reflected in the content of article 6.

15. His recollection regarding the second sentence of paragraph 2 was the s that of the Swedish representative. He believed it logical that no presumpt should attach to the operator in the case envisaged.

16. Mr. ZHAO Chengbi (China) said that, in his delegation's view, article 4 drafted was fair to both the customer and the operator. The operator had bo right and a duty to provide a signed receipt acknowledging the condition of goods. To a certain extent his delegation endorsed the views of the represe of the United Kingdom about the use of the word "customer", but it considere the term could be interpreted as meaning the person who requested the operat give a receipt for the goods. Such a request was reasonable and the custom should have the right to make it. Article 4 (2) was also fair and reasonab Subject to minor drafting changes, article 4 was acceptable to his delegati

17. Mr. TARKO (Austria) said that his delegation was satisfied with article 4 as it stood despite its complexities. The only problem he found was that the presumption referred to in paragraph 2 covered not only paragraph 1 (b) but also paragraph 1 (a), which did not require the operator to mention the condition of the goods. He should not therefore be penalized by a presumption in the latter case that the goods had been received in good condition.

18. Ms. SISULA-TULOKAS (Finland) shared the objection raised by the representative of Austria.

19. Mr. WALL (United Kingdom) said that one essential idea appeared to be missing from both paragraphs 1 and 2, namely that the operator had in fact received the goods. Some of the problems mentioned in connection with paragraph 2 might to a certain extent be alleviated if it was expressly indicated in both paragraphs that the action required under paragraphs 1 (a) and 1 (b) was dependent on the operator having received the goods. Any acknowledgement made under paragraph 1 (a) would simply be an acknowledgement of receipt, whereas the acknowledgement of receipt under paragraph 1 (b) also required reference to the condition of the goods.

20. The CHAIRMAN said that the present discussion in the Committee was similar to that which had taken place in the Working Group on International Contract Practices, where the article had been discussed at length. He therefore invited the Committee to proceed to a vote on article 4 (2).

21. Article 4 (2) was approved by 17 votes to 7, with 9 abstentions.

22. Mr. RUSTAND (Sweden) expressed surprise that the Chairman had called for a vote on paragraph 2. As he understood it, the Committee had been waiting for a new proposal from the United Kingdom delegation which would touch upon several of the paragraphs of article 4.

23. Mr. WALL (United Kingdom) said that the Committee should beware of assuming, as the Chairman seemed to have done, that his delegation's search for a way of incorporating some of the ideas in document A/CONF.152/C.1/L.31 into article 4 would have no implications for paragraph 2. He, too, had been surprised that the Chairman had proceeded to a vote on that paragraph. His delegation's new proposal concerning document A/CONF.152/C.1/L.31 would at the very least refer to paragraphs 1 (a) and 1 (b) of article 4. As those subparagraphs were specifically referred to in paragraph 2, the latter would obviously be affected. His intention was not to redraft article 4 completely. He would do his best to reflect the decision made by the Committee on paragraph 2 but reserved his delegation's right to decide, in seeking to reflect document A/CONF.152/C.1/L.31 in article 4, whether or not it wished to propose some consequential amendments to paragraph 2 as well as proposing amendments to paragraph 1. He regarded its freedom to do that as exceptionally important and requested the Chairman to allow him the necessary flexibility to approach the matter with the sense of responsibility which the Chairman himself would wish to exercise.

24. The CHAIRMAN said that he had noted the views of the United Kingdom. The vote on paragraph 2 was maintained with the reservation that there might be an amendment to document A/CONF.152/C.1/L.31.

25. Mr. LAVIÑA (Philippines) said that his delegation had abstained from the vote. Had there been sufficient clarification of paragraph 2, it would have voted in favour of it, but its doubts had not been dispelled, particularly with regard to the issue raised by the representative of Germany.

26. Mr. MESCHERYAK (Ukrainian Soviet Socialist Republic) said that his delegation had abstained from the vote because it considered that the Committee had been rushed into taking a decision. It nevertheless believed that the difficulties which had arisen could be overcome by suitable efforts.

27. Mr. RUSTAND (Sweden) said that his understanding was that at the previous meeting the Committee had tacitly agreed to await the new proposal for article 4 which the United Kingdom had undertaken to draft. As far as paragraph 2 was concerned, the United Kingdom had expressed doubts about the advisability of including the second sentence in the draft. Bearing in mind the discussion subsequent to that, nobody present could possibly have assumed that the new United Kingdom proposal would not affect paragraph 2. What had occurred at the present meeting had confirmed his impression that the basic text was considered a fait accompli and that any serious attempts at improving it were unnecessary and perhaps even unwelcome.

28. Mr. RAO (India) said that his delegation had abstained from voting. There appeared to have been undue haste in the recourse to a vote. The representative of the United Kingdom had indicated at both the present and the previous meeting that he was working on certain ideas connected with article 4 and a large number of delegations had expressed misgivings about that article. Efforts to reach a consensus in the Committee should not be discouraged, particularly where opinions appeared to be equally divided. He therefore requested the Chairman to be patient with the Committee and where possible to consider setting up small negotiating groups to resolve difficult issues. Had that been done where paragraph 2 was concerned, the negotiations would undoubtedly have produced a consensus at the beginning of the following week.

29. Mr. WALL (United Kingdom) said that, following the vote, he had understood that he would be unable to make a consequential amendment which would involve deleting the second sentence of paragraph 2. As far as he was concerned the decision had been taken to retain that sentence. His attention would now focus on such consequential amendments to paragraph 2 as arose from his attempts to incorporate into paragraph 1 the ideas expressed in document A/CONF.152/C.1/L.31. In the meantime, he referred the Chairman to rule 7 of the rules of procedure which, as applied mutatis mutandis to the Committee, enjoined the Chairman to promote general agreement. All delegations might usefully bear that in mind.

The meeting was suspended at 4.05 p.m. and resumed at 5.15 p.m.

ELECTION OF A VICE-CHAIRMAN AND A RAPPORTEUR (agenda item 2) (continued)

30. Mr. LAVIÑA (Philippines) nominated Mr. Soliman (Egypt) for the post of Vice-Chairman and Mr. Safarian Nematabad (Islamic Republic of Iran) for that of Rapporteur.

31. Mr. Soliman (Egypt) and Mr. Safarian Nematabad (Islamic Republic of Iran) were elected Vice-Chairman and Rapporteur respectively.

The meeting rose at 5.20 p.m.